Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

JACKIE R. MATTISON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ALAN L. ZEGAS
Attorney for Petitioner
552 Main Street
Chatham, New Jersey 07928
(973) 701-7080

153835

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

Whether Petitioner's constitutional rights to due process and a fair and impartial trial by jury were violated by the district court's disqualification of a minority juror from service for allegedly sleeping without holding a hearing and instead *sua sponte* swearing in its law clerk to act as a witness on the issue and making references to juror conversations about alleged racial bias without allowing defense counsel to question the panel on the issues?

Whether the district court violated Petitioner's federal constitutional right to due process and to a fair trial by improperly fashioning a jury charge based upon a violation of 18 U.S.C. § 1952, for carrying on unlawful activity proscribed under the New Jersey Gratuity Law, because it erroneously interpreted a New Jersey statute by not instructing that an express agreement was necessary that the benefit received by the public servant was knowingly and wilfully accepted in exchange for influence over the performance of official duties as recently held by this Court in *United States v. Sun-Diamond Growers of California*, 119 S. Ct. 1402, 1999 U.S. LEXIS 3001 (1999), when evaluating the similar federal gratuity statute codified at 18 U.S.C. § 201(c)(1)(A)?

Whether the district court's erroneous interpretation of the Hobbs Act and the resulting, improper fashioning of a jury instruction which omitted the requirement that there be proof of an express *quid pro quo* agreement for a violation of the Act violated Petitioner's federal constitutional right to due process and to a fair trial despite the circuit court split on the elements necessary to establish an offense in non-campaign contribution cases?

Whether the district court's erroneous interpretation of the Wire and Mail Fraud Act and improper jury charge, which failed to instruct that the citizens allegedly deprived of the public official's honest services actually suffered an actual harm or that actual harm was intended or contemplated by the public official, violated Petitioner's federal constitutional right to due process and to a fair trial?

Whether Petitioner's constitutional rights to due process and a fair and impartial trial by jury were violated by the district court's improper ruling that evidence of unrelated money in the amount of $157,000 seized from the home of witness Janice Williams, Petitioner's girlfriend, was admissible despite the highly prejudicial impact on Petitioner caused by the admission of the evidence?

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Petitioner, Jackie R. Mattison, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit denying Petitioner's appeal and affirming the judgment of conviction entered by the trial court.

OPINIONS BELOW

The Court of Appeals affirmed the judgment of conviction by opinion filed April 19, 1999 [1A][1] and by judgment order entered on the same date. [15A]. During the trial, defendant opposed the trial court's decision to disqualify an African-American juror. United States District Court Judge William G. Bassler denied defendant's application and filed a memorandum opinion and order disqualifying this juror. [Da6594-Da6597]. Defendant moved for a judgment of acquittal on Counts 13 through 19, the mail and wire fraud honest services counts. The District Court Judge denied the motion by a memorandum opinion and order dated March 4, 1997 [Da6476-Da6481].

STATEMENT OF JURISDICTION

Petitioner was originally a defendant in a criminal action brought in the United States District Court for the District of New Jersey. The District Court had subject matter jurisdiction pursuant to 18 U.S.C. § 3231. The judgment of conviction was entered against defendant on July 14, 1997, and filed on the same date, following a sentencing after a jury trial. [Da21]. A timely appeal was filed with the United States Court of Appeals for the Third Circuit, which had appellate jurisdiction to review the judgment of the District Court pursuant to 28 U.S.C. § 1291. [Da1]. An opinion and judgment order affirming the judgment of conviction was entered by the Third Circuit on December 4, 1996. [1A, 15A].

Petitioner seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit. This Court has jurisdiction to review the judgment below pursuant to 28 U.S.C. § 1254(1).

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1. The notation "A" refers to the appendix annexed to this Petition. The notation "Da" refers to the appendix filed by defendant with the United States Court of Appeals for the Third Circuit.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULE INVOLVED

The Petitioner's constitutional rights to Due Process and to a fair and impartial trial by jury, as guaranteed under the Fourteenth, Fifth, and Sixth Amendments, are pertinent to this case. Also applicable are the Hobbs Act, 18 U.S.C. § 1951; the statutes proscribing mail fraud, 18 U.S.C. § 1346, and wire fraud, 18 U.S.C. § 1343; Federal Rule of Evidence 403; and the statute proscribing official bribery, 18 U.S.C. § 1952(a), in conjunction with a violation of the New Jersey Gratuity Act, N.J.S.A. 2C:27-6(a). The applicable provisions of law are set forth in the annexed appendix.

STATEMENT OF THE CASE

On January 25, 1996, an indictment was returned by the Grand Jury for the District of New Jersey against defendants Jackie R. Mattison and William F. Bradley. The indictment charged defendants jointly with a conspiracy to accept corrupt payments, 18 U.S.C. § 371 [Count 1]; acceptance of $1,640 to influence and reward [Count 2]; acceptance of $3,600.00 to influence and reward [Count 3]; acceptance of $3,600.00 to influence and reward [Count 4]; acceptance of $3,575.00 to influence and reward [Count 5]; bribery, 18 U.S.C. § 666(a)(1)(b); a scheme to extort money under color of official right, 18 U.S.C. §§ 1951(a), 1951(b)(2) and (b)(3), [Count 6]; use of a facility in interstate commerce to illegally benefit a public servant, 18 U.S.C. §§ 1952(a)(1) and (a)(3), [Counts 7 to 12]; and deprivation of the right to the honest services of public officials, 18 U.S.C. §§ 1341, 1343 and 1346, [Counts 13 to 19]. [Da26-Da61]. The indictment also charged defendant William F. Bradley, individually, in seven separate counts. *Id.*

Jury selection for the trial began on January 7, 1997. The trial commenced on January 15, 1997. On March 17, 1997, the court charged the jury. On March 21, 1997, the jury returned a verdict of guilty against defendant on all counts charged against him.

On April 15, 1997, defendant filed a motion for an order granting a judgment of acquittal or a new trial. By Memorandum Opinion and Order dated July 14, 1997, the court denied defendant's motion for judgment of acquittal or a new trial. [Da6450-Da6466]. The court rejected defendant's sentencing arguments in a Memorandum Opinion and Order also dated July 14, 1997. [Da6467-Da6475].

On July 14, 1997, the District Court sentenced defendant to 41 months in federal prison on each count to run concurrently. [Da21-Da25]. A supervised release term of three years was also imposed. *Id.* In addition, defendant was ordered to contribute 400 hours of community service over the three-year period of supervised release. *Id.*

A notice of appeal of defendant's sentence was filed on July 17, 1997. [Da1]. On July 29, 1997, defendant filed a motion for bail pending appeal of his conviction which was denied in a Memorandum Opinion and Order dated August 19, 1997. On April 19, 1999, in a written opinion, a panel of judges of the Third Circuit Court of Appeals affirmed the District Court's entry of the judgment of conviction and sentence. [1A].

STATEMENT OF FACTS

Defendant Mattison was the Chief of Staff of the Mayor of the City of Newark, and co-defendant Bradley was the sole proprietor of Bradley Financial Services, an insurance brokerage business. [Da26-Da61]. The government maintained that, as Chief of Staff, one of defendant's powers and duties was sitting on the Newark Deferred Compensation Committee, which promulgated a deferred compensation plan for City employees. *Id.*

The deferred compensation plan was a program that permitted employees to contribute a portion of their salary to interest-bearing investments, thereby deferring federal income tax payments. *Id.* The government claimed that Bradley was corruptly appointed as a consultant to administer the City's deferred compensation plan. The alleged corruption was a

purported agreement Bradley made with Mattison to pay him for arranging to have the City contract with him. Two companies were involved in the plan: Great West Life [hereinafter "Great West"], a large deferred compensation provider who received a contract to provide services to the City of Newark, and Corroon & Black [hereinafter "Corroon"], who received a contract with the City of Newark Board of Education to provide insurance services. [Da281]. The government argued that Great West hired Bradley as a political consultant and that Corroon hired him as a subcontractor due to Mattison's influence. [Da281; Da290-Da291].

The core of the government's charges against Mattison was that he, co-defendant Bradley, and Mattison's girlfriend, unindicted co-conspirator Janice Williams, participated in a corrupt agreement under which they demanded and received illegal payments during the administration of the deferred compensation plan from 1990 through 1995. The government claimed that Mattison corruptly used his influence to sway the decision-makers in the City to ensure that contracts would be awarded to Bradley and then participated in a scheme to accept payments from Bradley as payoff for the purchased influence and favors. [Da278-Da280; Da299-Da230; Da5609-Da5619].

The defense maintained throughout that any checks given by Bradley to Mattison or Williams represented loan payments. Mattison had made a loan to Bradley at one point, and Bradley had made three loans to Williams because she was experiencing grave financial difficulties with her business. The testimony elicited throughout the trial by both government and defense witnesses was that Mattison never exerted any influence on anyone to make the City of Newark accept the contracts with Great West and Corroon. Rather, Great West and Corroon had the most beneficial services to provide to the City, and the contracts with them were awarded solely on the merit of the companies and were truly the best providers for the City to utilize.

At trial, the government conceded that no witness had ever stated that Mattison had contacted them or tried to influence them in any way with respect to Great West, Corroon or Bradley. As a result, the government advanced the theory, which the court eventually accepted, that it did not have to prove that Mattison used any actual influence to sway the decision-makers but solely needed to show that a corrupt agreement existed between Mattison and Bradley out of which Mattison received illegal payments from Bradley.

After both sides called numerous witnesses and then rested, the court held a charge conference between the parties to review the jury instructions. [Da5508-Da5577]. The summations then commenced. The court charged the jury on the date of March 17, 1997. [Da6239-Da6327]. On March 21, 1997, the jury then came back with the unanimous verdict of guilty as to all counts against both defendants.

REASONS FOR GRANTING THE WRIT

I. PETITIONER'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR AND IMPARTIAL TRIAL BY JURY WERE VIOLATED BY THE DISTRICT COURT'S DISQUALIFICATION OF A MINORITY JUROR FROM SERVICE FOR ALLEGEDLY SLEEPING WITHOUT HOLDING A HEARING AND INSTEAD *SUA SPONTE* SWEARING IN ITS LAW CLERK TO ACT AS A WITNESS ON THE ISSUE AND MAKING REFERENCES TO JUROR CONVERSATIONS ABOUT ALLEGED RACIAL BIAS WITHOUT ALLOWING DEFENSE COUNSEL TO QUESTION THE JURY PANEL ON THE ISSUES.

Defendant's rights to due process and to a trial by a randomly selected, fair and impartial jury, were denied by the disqualification of Alternate Juror Number 1 from jury service without proper inquiry or notice to defendant. Several weeks after trial commenced, counsel was advised by the court that some jurors seated next to Alternate Juror Number 1 had complained about an alleged odor problem. [Da6459]. After

consulting with counsel, the court decided to instruct the deputy clerk to move the juror to seat number one, which was located outside the jury box, with the explanation that this would make it easier for the juror to get to and from her seat. [Da6460]. The court emphasized that because the juror was an African-American, as were defendants, it was sensitive to the fact that defendants did not want her to be excused. [Da2719-Da2720; Da6460]. Thereafter, no additional complaints were received about the alleged odor problem.

On March 12, 1997, just prior to the completion of summations, the government complained to the court that Alternate Juror Number 1 was allegedly eating paper and, although it had not been raised by the jurors for over a month, suggested that the court conduct an inquiry with respect to the juror's alleged odor problem. [Da5707-Da5711]. The court denied the government's request noting that it had been over a month and no complaints at all had been received from the jury. Defense counsel noted, however, that they were disturbed by the motivation of the government in seeking to have the juror excluded, particularly because the juror was an African-American and another juror on the panel had raised an issue concerning vacation plans which could potentially create a vacant seat. [Da5707-Da5714; Da6460-Da6461].

The following day Alternate Juror Number 4, who had a death in her family, asked to be excused so that she could attend the funeral. [Da5926-Da5927]. When the court called the juror into chambers to advise her she was dismissed, the district court judge, without any reason, inquired of the juror whether there was any problem with Alternate Juror Number 1. The juror then volunteered:

> I've observed that she is not a very good listener and I do believe that her mind-set was made up exactly in the beginning. And I do feel there is a race issue there
>
> . . . .

> It was on something I think that was said in the jury room one time, a remark, and I'm sorry I don't have a photographic or photogenic mind, but it was something that was said. And I thought I heard it and repeated, and she denied it. And then I said — my answer to that was, you have to consider what the Judge charges you to consider, and that was the end of that. Okay? That's all I said.

[Da5932]. The juror further offered that she did not notice any problems with odor or hygiene and stated "[the jury is] a very loving group, I think as groups go. The cohesiveness has been very good. There have been really no black/white issues. I think there are some undercurrent ones because most of them do tend to go off somewhere." [Da5933].

Thereafter the district court judge described the exchange to counsel stating that, although the juror was very reluctant to discuss the matter, she stated to the judge "it's apparent to me that [Alternate Juror Number 1] has already made up her mind not to convict." [Da5936]. The judge further claimed that the juror had detected an undercurrent of some kind of racial tension and that she felt that the black jurors were congregating amongst themselves. [Da5937]. Consequently, the juror was submitted to questioning by counsel. [Da5942]. In response to questioning by the government, the juror stated that while she could not speak for Alternate Juror Number 1 as to whether she had made up her mind about the entire case, she believed she may have made up her mind about a particular issue in the case. *Id.* The juror added that the comment which was allegedly made by Alternate Juror Number 1 led her to believe that her state of mind at the time was favorable to the defense. [Da5947].

After excusing that juror, the district court judge, without any notice to defense counsel, had his law clerk sworn in to relay additional information about Alternate Juror Number 1. The following exchange occurred between the judge and his law clerk:

THE COURT: You have been sitting through most of the closing arguments, have you not?

MS. RABINER: Yes, I have.

THE COURT: And you've been sitting opposite the jury?

MS. RABINER: Yes, I have.

THE COURT: And I'd like you to share with everyone your observations.

MS. RABINER: During Mr. Nobile's argument, I observed [Alternate Juror Number 1] sleeping. I know she was sleeping because, first of all, she snored, and that was something that was audible not only to myself, but also to people who were sitting in the galley. And I know, in fact, she was sleeping because the Juror No. 1 next to her had to move her arm in order to wake her up because she started snoring in a very audible fashion.

Even after she was woken up she did not appear to be paying attention to any of the Government's testimony — or Government's argument and I watched her carefully when the defense started presenting its argument with both Mr. Brown and Mr. Ashley yesterday in the beginning of his closing argument, and she was extremely attentive, she followed everything. And that was my observation.

[Da5950-Da5951].

Defense counsel noted that it is impossible to determine what a juror is thinking simply by viewing their physical reactions and that a juror may not be sleeping or failing to pay attention even though his or her eyes may appear shut. [Da5951]. In addition, defense counsel pointed out that another juror was closing his eyes in the back row during summation and that several of the jurors from time to time throughout the lengthy trial had closed their eyes which is not an uncommon occurrence. [Da5951-Da5952]. When the court indicated that it would

interview Alternate Juror Number 1 on the basis of Alternate Juror Number 4's comments, counsel for both defendants moved for a mistrial. [Da5959]. Defense counsel maintained that such a court action was inappropriate at that time as there was not a legitimate basis for such an inquiry and would prejudice the juror and her potential for future service. *Id.* Defense counsel also stressed that the court's action could have the ability of affecting the other jurors remaining on the panel. *Id.* Consequently, the court decided not to conduct any further inquiry on the matter until defense counsel finished summations. [Da5963-Da5964].

After summations, Juror Number 7 was excused due to vacation plans, leaving a vacant seat on the jury panel. [Da6084-Da6085]. The court then summarily announced that Alternate Juror Number 1 would also to be dismissed for failing to pay attention during closing arguments before conducting the promised inquiry. [Da6086]. Defense counsel immediately objected, in particular to the fact that the court had decided to unilaterally dismiss the juror without first conducting an inquiry of her before rendering its decision. *Id.* Defense counsel stated:

> There should be an inquiry of her. She should be asked whether she was paying attention, she should be asked whether she has formulated any opinions. These things should be put to her. I don't think that it's proper to excuse a juror based on mere observation. I can tell you, I was looking at the juror in the far right-hand corner with the mustache, he was dozing off for part of the summation.

Id. Moreover, defense counsel maintained that their observations of the juror was that she was awake and alert throughout the proceedings, that the action taken by the court would have a negative impact upon the rest of the jury, who would be unaware as to why a certain panel member was being excused, that at least two other jurors were observed sleeping, and that the government had been improperly seeking to dismiss the juror for pretextual reasons since the inception of the trial. Defense

counsel renewed defendant's application for a mistrial. [Da6095-Da6099].

Immediately after the court surprised counsel with the announcement that it was dismissing Alternate Juror Number 1, counsel alerted the court to the existence of the Third Circuit's decision in *United States v. Resko*, 3 F.3d 684 (3d Cir. 1993), which requires that a voir dire of the jurors be conducted to ferret out any potential contamination of the jury. The court, apparently because it had prepared its opinion excusing the juror the night before, would not at first accept from counsel even the citation to the case. Subsequently, the court agreed to look at *Resko* but it did not conduct the hearing prescribed by the case.

In light of *Resko*'s holding, as well as the District Court's report to counsel the day before that the juror had formed an opinion about the case, and the court's finding that she had been sleeping (a finding that was at variance with the observations of defense counsel), defendant requested that: (1) Alternate Juror Number 1 be examined to determine whether she had, in fact, been sleeping; and (2) that all the jurors be questioned about whether the alternate juror had expressed an opinion on guilt or innocence and whether that opinion had been discussed among the jurors. Defense counsel also pointed out that other jurors, besides this alternate juror, had their eyes closed during the trial.

The District Court refused to conduct an examination of the jurors, saying, contrary to what it had said just the day before, there was nothing in the record to indicate that the alternate juror had expressed a premature opinion. The day before, however, the court told all counsel, on the record, that it had been advised by Alternate Juror Number 4 that it was apparent to her, from conversations she had with Alternate Juror Number 1, that she "had already made up her mind not to convict" and that "the black jurors have been congregating among themselves." [Da5936]. Irrespective of the accuracy of this information, one thing was clear: it was the court's belief that

Alternate Juror Number 1 had expressed an opinion and had discussed her view of the case with other jurors. Having this belief, the court disqualified the alternate juror under a false pretense.

The *Resko* case, which had been cited to the court by defendant, specifically held that a trial judge, upon learning that a juror has prematurely expressed an opinion about a defendant's guilt or innocence, has an obligation to fully investigate. In *Resko*, the trial judge became aware that several of the jurors had been discussing the case and distributed a questionnaire to the jurors asking them if they had discussed the case and whether the discussion had led them to form an opinion as to the defendants' guilt. All the jurors responded that they had discussed the case but had not formed an opinion on guilt or innocence. The trial judge denied defense counsel's requests for individualized voir dire to ascertain what exactly had occurred and whether any prejudice resulted from the premature deliberations.

On appeal, the Third Circuit held that the district court erred by "refusing to conduct a more searching inquiry into the potential prejudice to the defendants from the jury's misconduct." 3 F.3d at 686. The *Resko* court further noted:

> We conclude that the district court erred by declining to engage in further inquiry — such as individualized voir dire — upon which it could have determined whether the jurors had maintained open minds. By failing to do so, the district court allowed the jurors, in effect, to be the judge of whether or not they had been influenced by their premature discussions. In this way, the district court effectively ceded to the jury its responsibility for determining whether or not the defendants would be prejudiced by the jurors' misconduct . . . when jury misconduct . . . has been alleged, **the district court should: ascertain whether the misconduct actually occurred; if it did, determine whether it was prejudicial; and if**

> **there are not grounds for a new trial, specify the reasons it decided that misconduct did not occur, or occurred but was not prejudicial.**

Id. at 691, citing *United States v. Richman*, 600 F.2d 286, 295 (1st Cir. 1979). [Emphasis added]. *See also United States v. Vento*, 533 F.2d 838, 869-870 (3d Cir. 1976) (finding that a hearing was proper when one juror was accused of predetermining the case and tainting the rest of the jury and holding that "[i]f there is reason to believe that jurors have been exposed to prejudicial information, the trial judge is obliged to investigate the effect of that exposure on the outcome of the trial. There is no obligation for the judge to conduct an investigation, however, where no foundation has been established."); *Miller v. Stagner*, 757 F.2d 988, 995 (9th Cir. 1985) (finding that the district court acted properly by holding a hearing in chambers with counsel present to question and determine from various jurors whether another juror had been intoxicated and sleeping during trial).

In addition, the court's actions in swearing in his law clerk on the issue of whether or not the juror was sleeping and subsequent reliance upon her observations in deciding to disqualify the juror, seriously prejudiced defendant's rights. First, the law clerk had obviously communicated her observations to the court *ex parte*, which is what led the court to swear her in as a witness. The court's consideration of these *ex parte* statements deprived defendant of his right to a fair trial and an open hearing. To this day, defendant does not know what caused the law clerk to focus on this particular juror and what instructions were given to her. *See Jaques v. Reiss Steamship Co.*, 761 F.2d 302 (6th Cir. 1985) (Hillman, J., dissenting) (noting that a law clerk was an improper witness to render testimony that led to a judge's findings on an *ex parte* basis and writing, "The judge's findings were based on ex parte accounts related to her by her law clerk and the district court in Baltimore."). *See also Fredonia Broadcasting Corp. v. RCA Corp.*, 569 F.2d 251 (5th Cir. 1978) ("A law clerk by virtue of

his position, is obviously privy to his judge's thoughts in a way the parties cannot be.").

To resolve these issues, defendant would have had to cross-examine the law clerk. Cross-examination, however, would have placed defendant in the untenable position of having to attack the law clerk's credibility. Defendant, who is fully aware that the law clerk is an influential extension of the court, would be loathe to challenge her credibility, particularly when she was called upon later to assist the court with motions in which defendant had a direct interest. If the law clerk was cross-examined and assumed a role adverse to defendant, the appearance of fairness which a district court must preserve would have been destroyed. In *Oliva v. Heller*, 839 F.2d 37 (2d Cir. 1988), the court noted the importance of law clerks to the exercise of the judicial function, and also noted the close interrelationship between judges and their clerks:

> [A] law clerk is probably the one participant in the judicial process whose duties and responsibilities are most intimately connected with the judge's own exercise of the judicial function . . . Law clerks are closely connected with the court's decision-making process . . . Clerks are privy to the judge's thoughts in a way that neither parties to the lawsuit nor his most intimate family members may be . . . Law clerks are simply extensions of the judges at whose pleasure they serve.

Id. at 40.

The district court, it its memorandum opinion disqualifying the juror, strongly relied upon its law clerk's observations. [Da6596-Da6597]. Defendant maintains that the first alternate juror was being singled out because the court believed, from its interview of Alternate Juror Number 4, that the first alternate had prematurely expressed an opinion about the case. That the first alternate was singled out is evident from comments made by the district court in its opinion. The court noted that during the closing argument of defendant Mattison's counsel, it

observed the juror's "head nodding 15 times from 2:30 - 3:45. Her eyes were not just resting. It was apparent that she was nodding off and was not following the argument." *Id.* Interestingly, the court's own findings were inconsistent with its law clerk's observations, as the law clerk had stated that the same juror had paid attention to all of defense counsels' closing arguments. [Da5951].

What is disconcerting to defendant about the court's observations, was that not only was this African-American juror the singular focus of the court's attention, but the court, upon observing her nodding her head believing she was sleeping, did not stop the proceedings so that the conduct could be abated. Irrespective of the court's intention, the unfortunate, yet unmistakable impression created, was that the court allowed allegedly inappropriate conduct to continue, knowing that if it did, the juror would be removed. On defendant's behalf, it was improper for the court to allow the juror to continue sleeping, if that was what the court thought she was doing, without intervening.

In light of the holding in *Resko*, the court's reliance upon its law clerk as a fact witness, its refusal to permit defense counsel to testify as to their observations, and its unwillingness to conduct a voir dire of Alternate Juror Number 1 and the other jurors, it is clear that defendant's rights to a fair trial and due process were unquestionably denied by the *sua sponte* removal of the African-American juror. The procedures employed by the court to deal with this highly sensitive issue violated defendant's constitutional rights to a trial by jury, to due process, and to a fair trial. At minimum, defendant was entitled to a post-trial hearing at which the jurors could have been voir dired on the serious issues that had surfaced at the conclusion of the trial rather than an abrupt dismissal of the African-American juror based solely upon the court and its law clerk's observations which were factually inapposite to defense counsel's observations.

Under Rule 19(b) of the Local Rules of the District Court, defendant may not interview jurors without leave of court. The exceptional circumstances of this case required the District Court to grant defendant's request to conduct interviews to establish for this Court that he was entitled either to a new trial or, at minimum, to a hearing on juror misconduct. The denial of such minimal relief unfairly and irrevocably deprived defendant of any opportunity to demonstrate that his constitutional rights to due process and to a fair and impartial jury were seriously infringed.

II. THE DISTRICT COURT VIOLATED PETITIONER'S FEDERAL CONSTITUTIONAL RIGHT TO DUE PROCESS AND TO A FAIR TRIAL BY IMPROPERLY FASHIONING A JURY CHARGE BASED UPON A VIOLATION OF 18 U.S.C. § 1952 FOR CARRYING ON UNLAWFUL ACTIVITY PROSCRIBED UNDER THE NEW JERSEY GRATUITY LAW BY NOT INSTRUCTING THAT AN EXPRESS AGREEMENT WAS NECESSARY REGARDING THE BENEFIT RECEIVED BY THE PUBLIC SERVANT IN EXCHANGE FOR INFLUENCE OVER THE PERFORMANCE OF OFFICIAL DUTIES AS RECENTLY HELD BY THIS COURT IN *UNITED STATES v. SUN-DIAMOND GROWERS OF CALIFORNIA*, 119 S. Ct. 1402, 1999 U.S. LEXIS 3001 (1999), WHEN EVALUATING THE SIMILAR FEDERAL GRATUITY STATUTE CODIFIED AT 18 U.S.C. § 201(c)(1)(A).

The trial court charged the jury on New Jersey's gratuity law by informing the jurors that they could "infer that the benefit accepted was to influence the public servant with respect to his duties," if the "benefit's value is great enough." The court did not supplement its charge, as it had refused to do on the Hobbs Act charge, with language informing the jurors that they could consider defendant's failure to exercise influence, failure to take official action, and the lack of an express agreement, as evidence

that he did not have the specific intent necessary to commit the crime.

Defendant was charged in Counts 7 through 12 with the use of a facility in interstate commerce to illegally benefit a public servant. 18 U.S.C. §§ 1952(a)(1) and (a)(3). Under that charge, the government was required to prove that defendant used a facility in interstate commerce either to distribute the proceeds of unlawful activity or to promote or facilitate the unlawful activity of accepting an illegal benefit in violation of New Jersey law. The specific charge given to the jury on the violation of New Jersey law read as follows:

> [T]he illegal benefit that the public official accepted must have had the capacity to influence the performance of the public servant's official duties. You may infer that the benefit accepted had the capacity to influence the public servant when the value of the benefit involved, the interests of the person who offers, confers or agrees to confer such benefit and the duties of the public servant are such that there is a reasonable likelihood that the public servant would perform his official duties in a biased or partial manner. **The Government, therefore does not have to produce express testimony from the giver, taker, or another, that the benefit was given to influence official duties. So, when the benefit's value is great enough, and the taker is in a position to act in his official capacity to help or hurt the giver of the benefit, and the benefit is not one of the exceptions that I have mentioned, you may infer that the benefit was accepted to influence the public servant with respect to his duties.**

[Da6521-Da6522]. [Emphasis added].

In instructing the jury, the court improperly removed from the jury's deliberations a necessary element which must be established by the government: the proof of an express

agreement that the benefit was received by the public servant with the knowledge and understanding that it was given and accepted to influence his official duties in some fashion.

Pursuant to N.J.S.A 2C:27-6, which deals with gifts to public servants, "A public servant commits a crime if he, knowingly and under color of his office, directly or indirectly solicits, accepts or agrees to accept any benefit not allowed by law to influence the performance of his official duties." N.J.S.A 2C:27-6(a). This statute has been specifically interpreted to require a *quid pro quo* relationship between the gift given and the official activities committed and "under color of office" signifies meaning being related to the office sufficiently to influence public duties. *See* N.J.S.A. 2C:27-6, cmt. 4, 1999-2000 ed. (citing *State v. Savoie*, 67 N.J. 439 (1975) (holding that "under color of law" necessarily requires a *quid pro quo* relationship)).

In *Savoie*, a municipal building inspector was charged with accepting a cash "Christmas gift" from a builder and was convicted of extortion under the statute. His conviction was reversed because the court held that the government must show that the taking or receipt of money by a public servant was directly related to the performance of official duties in some regard. *Savoie*, 67 N.J. at 449. Thus, the statute has been specifically interpreted to require a *quid pro quo* relationship between the gift given and the official misconduct and activities committed. Indeed, as the *Savoie* court made clear, the receipt of a benefit by a public servant must be shown to have been taken by the official in return for his promise to act in a certain way regarding the performance of his duties. The statute clearly notes that, "A public servant commits a crime if **he, knowingly and under color of his office, directly or indirectly solicits, accepts or agrees to accept any benefit not allowed by law to influence the performance of his official duties**." N.J.S.A. 2C:27-6(a). (Emphasis added). Thus, the government was required to show that the receipt or taking by a public servant was intentional and directly related to the performance of his

official duties. Clearly, in light of the *Savoie* decision, the receipt of a benefit by a public servant must be shown to have been taken by the official in return for his promise to take action or non-action regarding the performance of his duties, and thus the district court acted in error by failing to charge the jury properly on this statute which comprised the underlying "unlawful activity" that defendant supposedly commit in violation of 18 U.S.C. §§ 1952(a)(1) and (a)(3). Similarly, this Court recently held in *United States v. Sun-Diamond Growers of California*, 119 S. Ct. 1402, 1999 U.S. LEXIS 3001, p. 3 (1999), that to sustain a violation of 18 U.S.C. § 201(c)(1)(A), which prohibits giving "anything of value" to a public official, the government "**must prove a link between a thing of value conferred upon a federal official and a specific 'official act' for or because of which it was given**." [Emphasis added]. The Court went on to explain the two subsections of the crime and the necessary intent which must be established:

> The distinguishing feature of each crime is its intent element. Bribery requires intent "to influence" an official act or "to be influenced" in an official act, while illegal gratuity requires only that the gratuity be given or accepted "for or because of" an official act. In other words, for bribery there must be a quid pro quo — a specific intent to give or receive something of value in exchange for an official act. An illegal gratuity, on the other hand, may constitute merely a reward for some future act that the official will take. . . .
>
> . . .
>
> The point in controversy here is that the instructions went on to suggest that §201(c)(1)(A), unlike the bribery statute, did not require any connection between respondent's intent and a specific official act
>
> . . .

> The insistence upon an "official act," carefully defined, seems pregnant with the requirement that some particular official act be identified and proved.

Id. at 12-16. Thus, in the substantially similar context of the federal illegal gratuity law, proscribed in 18 U.S.C. § 201(c)(1)(A), this Court ruled that the government must prove a connection between the thing of value conferred upon the public official and a specific official act which must be identified and established. In following, New Jersey's Gratuity Law must be read in the same constitutionally mandated light to require proof of the necessary agreement and intent.

The district court removed that necessary element required to be proven by the government when it charged that evidence was not needed to show that the benefit was given to influence official duties and that the jury could infer that the benefit was accepted to influence the public servant solely if the value of the benefit was great. The charge impermissibly removed a necessary element of the offense and because the court erroneously charged the jury on the New Jersey Gratuity Law regarding gifts to public servants, defendant was denied his federal, constitutional right to due process and a fair trial.

III. THE DISTRICT COURT'S ERRONEOUS INTERPRETATION OF THE HOBBS ACT AND THE RESULTING, IMPROPER FASHIONING OF A JURY INSTRUCTION WHICH OMITTED THE REQUIREMENT THAT THERE BE PROOF OF AN EXPRESS *QUID PRO QUO* AGREEMENT FOR A VIOLATION OF THE ACT VIOLATED PETITIONER'S FEDERAL CONSTITUTIONAL RIGHT TO DUE PROCESS AND TO A FAIR TRIAL.

Defendant was charged in Counts 2 through 5 of the Indictment with a violation of 18 U.S.C. § 1951, commonly referred to as the Hobbs Act. Indeed, it was the Hobbs Act charge which formed the heart of the government's case. Consequently, the jury's view of the law under the Hobbs Act could well have affected the way it viewed the entire indictment. Defendant

maintains that there must be some intent to induce official action and a promise made to provide that action. There was no evidence in this case that defendant promised to do some act in exchange for Bradley's alleged payment of money. The instructions given to the jury on this charge failed to inform the jury that there must be an explicit promise made by a public official to act or not act in order to sustain a Hobbs Act conviction. *See United States v. Allen*, 10 F.3d 405, 411 (7th Cir. 1993); *United States v. Farley*, 2 F.3d 645, 651 (6th Cir.), *cert. denied*, 114 S. Ct. 649 (1993); *United States v. Garcia*, 992 F.2d 409, 414 (2d Cir. 1993); *United States v. Taylor*, 993 F.2d 382, 384 (4th Cir.), *cert. denied*, 114 S. Ct. 249 (1993). Significantly, there appears to be a split in the federal circuit courts over whether an explicit promise to act is a necessary prerequisite, and defendant argues that this Court's prior rulings require such a finding. Defendant maintains that the law requires an explicit promise. *See United States v. Collins*, 78 F.3d 1021, 1034 (6th Cir. 1996) (holding that McCormick requirement of a "quid pro quo" and a jury instruction on same, applies in non-campaign contribution cases and stating, "[a]lthough the Supreme Court has not directly ruled on the quid pro quo requirement outside the context of campaign contributions, most circuits that have addressed the issue have determined that the quid pro quo requirement applies in non-campaign contribution cases as well as campaign contribution cases"). *See also United States v. Sun-Diamond Growers of California*, 119 S. Ct. 1402, 1999 U.S. LEXIS 3001, p. 13 (1999) (evaluating the bribery statute codified in 18 U.S.C. § 201(B) and in that context broadly explaining that ". . . for bribery there must be a quid pro quo — a specific intent to give or receive something of value in exchange for an official act."); *United States v. Hairston*, 46 F.3d 361, 365 (4th Cir. 1995); *United States v. Taylor*, 993 F.2d 382 (4th Cir. 1993); *United States v. Martinez*, 14 F.3d 543, 553 (11th Cir. 1994); *United States v. Garcia*, 992 F.2d 409, 414 (2d Cir. 1993); *United States v. Montoya*, 945 F.2d 1068 (9th Cir. 1991) (conviction reversed for failure of jury

instructions to adequately define the elements of extortion under the Hobbs act as expressed in McCormick); *United States v. McClelland*, 941 F.2d 999 (9th Cir. 1991) (writ of *coram nobis* issued for court's failure to instruct that inducement is an essential element of Hobbs Act extortion and failure to so instruct the jury is reversible error).

In *Evans v. United States*, 504 U.S. 255 (1992), a non-campaign contribution case involving a Hobbs Act charge, the Supreme Court did not specifically rule on whether the government must prove the existence of an explicit *quid pro quo* agreement but did rule that a Hobbs Act offense is committed when a public official receives a payment **in return for his agreement to perform specific official acts**. Fulfillment of the *quid pro quo*, however, is not necessarily an element of the offense. *Id.* at 268. Although *Evans* holds that the public official does not need to carry out the *quid pro quo* agreement for a violation of the Act, the government must still establish and prove the existence of this type of agreement. Consequently, it can logically be concluded that a *quid pro quo* agreement must be explicitly proven, and the government is required to demonstrate what the express agreement was.

The Fourth Circuit in *Hairston* held that the government **must prove a *quid pro quo* relationship** when it charges extortion under color of right and noted that in *Evans* "the court wrote broadly enough to require proof of a quid pro quo in all cases charging extortion under color of official right." 46 F.3d at 372-373. *See also Taylor*, 993 F.3d at 385-386 (expressing concern over jury instructions which stated "[t]here would be no specific quid pro quo to establish extortion under color of official right" because the court believed this would allow a conviction under the Act for innocent payments made to a public official. Similarly, the Eleventh Circuit held in *United States v. Davis*, 30 F.3d 108, 109 (11th Cir. 1994) that "[u]nder Supreme Court precedent, an explicit promise by a public official to act or not act is an essential element of Hobbs Act extortion, and the defendant is entitled to a reasonably clear jury instruction

to that effect." *Accord United States v. Martinez*, 14 F.3d 543, 552-554 (11th Cir. 1994) (holding that the Hobbs Act requires evidence of a *quid pro quo* agreement to convict an official for extortion under the color of official right).

As the above precedent makes clear, several circuits require a specific *quid pro quo* understanding for the public official to either act, or not act, in an agreed upon way to establish a violation. Otherwise, any payments made to the official could expose him to liability whether or not he possessed the appropriate *mens rea* for a violation of the Act. The jury charge given here did not comply with this requirement and provided that the government need only show an implicit promise. Where, as here, defendant was not proven to have acted to influence governmental processes, the proper jury charge was crucial. The charge given, however, provided:

> The crime is completed at the time when the public official knowingly accepts the benefit in return for his agreement to perform or not perform an act related to his office. **Moreover, the Government does not have to prove that there was an express promise on the part of the public official to perform a particular act at the time of payment.**

[Da6510-Da6511]. [Emphasis added]. The jury charge effectively and dangerously eliminated the requirement that a specific *quid pro quo* relationship be proven by the government.

With respect to the Corroon transaction, the proofs were that the contract had been granted to the company **before Bradley was even designated as the minority contractor**. With respect to Great West, the undisputed testimony was that the Committee selected Great West on the merits of its plan, that Mattison had nothing to do with the selection process, and that Mattison did not attempt to influence in any way the plan selected by either the Committee or by the City Council. Indeed, the majority of the above testimony was elicited from the government's own witnesses and was reiterated by Mattison's defense witnesses. If the jury had been properly instructed that

the government was required to prove the parameters and existence of an express agreement to act or not act, there was a substantial likelihood that Mattison would not have been found guilty of a Hobbs Act violation. For this reason, the trial court erred by fashioning an improper jury charge on the Hobbs Act, and, as a result, defendant's federal constitutional rights to due process and a fair trial were violated.

IV. THE DISTRICT COURT'S ERRONEOUS INTERPRETATION OF THE WIRE AND MAIL FRAUD ACT AND IMPROPER JURY CHARGE VIOLATED PETITIONER'S FEDERAL CONSTITUTIONAL RIGHT TO DUE PROCESS AND TO A FAIR TRIAL.

The wire and mail fraud counts of the indictment (Counts 13 to 19) were another subject of serious dispute at trial. To prove mail and wire fraud, the government must prove, beyond a reasonable doubt: (1) the defendant's knowing and willing participation in a scheme or artifice to defraud with the specific intent to defraud, and (2) the use of the mails or interstate wire communications in furtherance of the scheme. 18 U.S.C. §§ 1341, 1343, and 1346; *United States v. Sawyer*, 85 F.3d 713 (1st Cir. 1996).

Defendant maintains that the government also had an obligation to prove that the entities effected by defendant's conduct suffered an actual harm.[2] *See United States v. Jain*, 93 F.3d 436 (8th Cir. 1996). Defendant's request to charge the jury on this specific issue, however, was rejected by the court. [Da6669-Da6671].

In *Jain*, the Eighth Circuit reversed the mail fraud conviction of a psychologist who received payments from a psychiatric hospital in return for referring his patients to that hospital. The

2. For a discussion of whether the deprivation of an official's "honest services" necessarily must include an actual harm or a contemplation of harm to the victims, *see* John Gibeaut, *Honest Conundrum*, ABA Journal, p. 36-37, Apr. 1997; John R. Wing, *'Honest Services': An Elusive And Elastic Concept in Law*, Business Crimes Bulletin, Vol. 3, No. 10, p. 9-12, Nov. 1996.

court found that there was no evidence that any patient suffered tangible harm or that any patient was financially harmed by the doctor's arrangement with the hospital. *Id.* at 441. Rather, the court found that the doctor provided quality psychological services, and the hospital was as good or better than any alternative facility. *Id.*

In reversing the doctor's conviction, the court found, "[e]ssential to a scheme to defraud is fraudulent intent. The government must show that some actual harm or injury was contemplated by the schemer." *Id.* at 441, citing *United States v. D'Amato*, 39 F.3d 1249, 1257 (2d Cir. 1994). In rejecting the government's contention that "tangible harm is irrelevant because it proved a scheme to defraud under 18 U.S.C. Sec. 1346," the court emphasized that "[t]he essence of a scheme to defraud is an intent to harm the victim. When there has been no actual harm, the government must produce evidence independent of the alleged scheme to show the defendant's fraudulent intent." *Id.* at 442.

Similarly, in *United States v. Rabbitt*, 583 F.2d 1014, 1026 (8th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979), the Eighth Circuit reversed the mail fraud convictions of Rabbitt, a state representative. Rabbitt had offered to introduce a friend's architectural firm to certain public officials responsible for awarding state architectural contracts in return for a ten percent commission on any work awarded. *Id.* at 1020. The government charged that his receipts of the resulting, undisclosed commissions defrauded the citizens of Rabbitt's honest services. *Id.* at 1025. **The evidence showed, however, that the officials who awarded the architectural contracts did so on merit alone, and Rabbitt played no role in the selection of the firm.** *Id.* at 1026. [Emphasis added]. Because Rabbitt did not control the awarding of the contracts or otherwise fail to fulfill his official duties, his conduct did not deprive the citizens of his honest services. *Id.*

"[A]lthough a public official might engage in reprehensible misconduct related to an official position, the conviction of that

official for honest-services fraud cannot stand where the conduct does not actually deprive the public of its right to her honest services, and it is not shown to intend that result." *United States v. Sawyer*, 85 F.3d 713, 725 (1st Cir. 1996). If the "scheme" does not, as its necessary outcome, deprive the public of honest services, then independent evidence of the intent to deprive another of those services must be presented. *See also United States v. D'Amato*, 39 F.3d 1249, 1257 (2d Cir. 1994) ("[w]here the scheme does not cause injury to the alleged victim as its necessary result, the government must produce evidence independent of the alleged scheme to show the defendant's fraudulent intent"); *United States v. Von Barta*, 635 F.2d 999, 1005-1006 n.14 (2d Cir. 1980) (noting that "the prosecution must prove that some actual harm" occurred); *United States v. Dixon*, 536 F.2d 1388, 1399 n.11 (2d Cir. 1976) (finding that the government must, at minimum, show that some harm was contemplated); *United States v. Dowling*, 739 F.2d 1445, 1448-1449 (9th Cir. 1984) (holding that the government must prove a scheme to defraud).

In this matter, the court committed reversible error by failing to charge the jury that the government needed to show proof of actual harm or, at minimum, contemplated harm through defendant's actions. Factually, there was no proof at all that defendant sought to harm the City or the Board of Education, that either entity suffered any actual harm, or that defendant contemplated any harm to either entity. Consequently, a reversal is warranted here as in *Rabbitt*, because the evidence demonstrated that the officials who awarded the contracts did so on merit alone and that the defendant played no role in the selection. 583 F.2d at 1026. Because defendant Rabbitt did not control the awarding of the contracts, or otherwise fail to fulfill his official duties, his conduct did not deprive the citizens of his honest services. *Id.* Similarly, because the government could not show any harm to the citizens of the City of Newark by defendant's conduct but actual benefit to the citizens and because this requirement was improperly omitted from the jury's

consideration of the offense, defendant was deprived his constitutional right to due process and to a fair trial.

V. PETITIONER'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR AND IMPARTIAL TRIAL BY JURY WERE VIOLATED BY THE DISTRICT COURT'S IMPROPER RULING THAT EVIDENCE OF UNRELATED MONEY IN THE AMOUNT OF $157,000 SEIZED FROM THE HOME OF WITNESS JANICE WILLIAMS, PETITIONER'S GIRLFRIEND, WAS ADMISSIBLE DESPITE THE HIGHLY PREJUDICIAL IMPACT ON PETITIONER CAUSED BY THE ADMISSION OF THE EVIDENCE.

The most damaging evidence introduced by the government at trial was the seizure of $157,000 in cash from the home of Janice Williams. Indeed, this case, which was highly publicized, became notorious as the case where a public official "hid money in his girlfriend's basement." This so-called evidence, however, should never have been admitted for several crucial reasons and was hotly contested from the beginning of the trial to the end.

Defendant maintained that the government's asserted ground for admission of the evidence, to impeach Williams, was merely a pretext for the real reason the government sought to have the evidence introduced — to impeach Mattison's character. The clear suggestion was that this money was Mattison's and that Williams was merely holding it for him, notwithstanding that the government could not prove any direct link between Mattison and the money. The limiting instruction offered by the court did little to correct the overwhelming prejudicial impact which the evidence already had on the jury. Plainly, the enormous capacity of the evidence to prejudice defendant's fair trial and due process rights far exceeded whatever probative value the evidence had on this limited issue. Moreover, the admission of this highly damaging evidence effected defendant's conviction on every count of the indictment.

The government claimed that the money found in Williams home was necessary to impeach her testimony that she needed

a business loan from Bradley. According to Williams, however, the money was found after her father's death in 1994 and after all the loan payments were made by her to Bradley. The evidence, therefore, was not directly impeaching of Williams' testimony, and the government had already attempted to impeach her by offering direct proof that she had access to other bank accounts with significant funds during the time Bradley made the loan payments to her. The evidence therefore was not only of limited probative value but cumulative as well.

The court clearly failed to conduct the proper balancing test when considering the admission of the evidence. Not only did the capacity of the evidence to prejudice defendant outweigh its probative value, it was so inflammatory that it deprived defendant of his constitutionally protected right to due process and to a fair trial. *See, e.g., Estelle v. McGuire*, 502 U.S. 62, 75 (1991) (holding that severely prejudicial evidentiary errors may violate due process and that inflammatory evidence may work a due process violation); *United States ex rel. Hickey v. Jeffes*, 571 F.2d 762 (3d Cir. 1978) (finding that erroneously admitted evidence which is highly prejudicial may result in a violation of the constitutional right to due process and a fair trial); *Jammal v. Van de Kamp*, 926 F.2d 918, 920 (9th Cir. 1991) (concluding that when evidence has been admitted and is of such inflammatory quality, it may necessarily prevent a fair trial).

Pursuant to Fed. R. Evid. 403, the court must balance the probative value of the evidence against its potential for prejudice when deciding whether to admit such evidence. *United States v. Driggs*, 823 F.2d 52, 54 (3d Cir. 1987); *Robinson v. Vaughn*, No. 95-2525, 1995 U.S. Dist. LEXIS 14071, p. 3 (E.D. Pa. Sep. 26, 1995). Fed. R. Evid. 403 specifically provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Fed. R. Evid. 403. As explained by the Advisory Committee Note to the Rule, the case law recognizes that certain circumstances will call for the exclusion of evidence which is of unquestioned relevance. Fed. R. Evid. 403, Comm. Note. Accordingly, there must be a balancing of the probative value and need for the evidence against its potential for harm. *Id.* "Unfair prejudice" within this context means a tendency to suggest decision on an improper basis. *Id.* In deciding whether to exclude evidence on grounds of unfair prejudice, courts must consider the probable effectiveness or lack of effectiveness of a limiting instruction. *Id.* Additionally, when conducting the balancing test, a legitimate consideration must be undertaken of the presence or absence of a genuine need for the evidence in question. *United States v. Schwartz*, 790 F.2d 1059, 1061 (3d Cir. 1986).

Applying the test to the facts here, it is clear that the court improperly admitted evidence that money, wholly unrelated to defendant, was found in Williams' home. The money could not in any way be linked to Mattison. The evidence, allegedly introduced to impeach Williams, was instead used by the government and probably by the jury, as indirect proof that Mattison had done something improper through association because $157,000 was found in his girlfriend's home. The evidence was even more prejudicial because the government failed to prove that Mattison had exerted any influence on governmental processes.

Moreover, despite the limiting instruction given by the court, the evidence admitted had the enormous potential to confuse the jury on the issues. In light of the severely prejudicial impact to Mattison, a public official charged with bribery, that resulted from the admission of evidence of $157,000 found in his girlfriend's home, no limiting instruction could possibly cure the taint that then surrounded the subsequent proceedings after the admission of the evidence. This simply was not an issue that the jury was capable of compartmentalizing to consider only for its limited purpose. *See United States v. Dansker*, 537

F.2d 40, 62 (3d Cir.), *cert. denied*, 429 U.S. 1038 (1976). Indeed, when determining whether to admit prejudicial evidence pursuant to Fed. R. Evid. 403, a court must conduct the proper balancing test to ensure that its probative value outweighs unfair prejudice to the defendant, confusion of the issues, or misleading a jury. *Old Chief v. United States*, 519 U.S. 172, 180 (1997); *United States v. Driggs*, 823 F.2d 52, 54 (3d Cir. 1987). If the proper balancing was conducted here, the evidence of the $157,000 would have been found inadmissible because the evidence's admission not only unfairly prejudiced the defendant, but it likely confused and mislead the jury into believing that the money constituted the "corrupt payments" that Mattison received from Bradley. Although the government asserted that Mattison received $16,872.50 in payments from Bradley, the jury must have thought that because Mattison's girlfriend had $157,000 in the house that she co-owned with Mattison, that Mattison received even more money from Bradley or that Williams was holding the money for Mattison. Thus, as there was other evidence used by the government to impeach Williams, any possible, probative value of the $157,000 was extremely low and was cumulative when balanced against the unfair prejudice and harm the evidence inflicted on Mattison.

Here, the evidence of $157,000 was never linked to Mattison, and there were less prejudicial ways to impeach Williams, as demonstrated by the government's repeated referrals to Williams' prior inconsistent statements before the grand jury. Rather, the evidence served only to allow the jury to make impermissible inferences and be lured into inferring that Mattison was corrupt and accepted illegal payments because the money was found in the house, and as the government argued in its summation, "that has to be explained." [Ja5676-Ja5677].

The only issue in this case was whether defendant Mattison was accepting illegal payments as a bribe. The government could not prove that Mattison exerted any influence on any city employee or agent in an attempt to improperly award contracts to Great West or to Corroon and Black (indeed the

uncontradicted evidence was that these contracts were fiscally appropriate) and could not prove that Mattison's relationship with Bradley was improper. The government, through the court's ruling, improperly but successfully was able to cast a large shadow of doubt and suspicion over Mattison's credibility through the guise of impeaching Williams, the government's own witness. Moreover, the evidence was not directly related to any offense charged in the indictment, nor did it relate to the scheme or conspiracy charged. *See Driggs*, 823 F.2d at 54-55 (finding that the district court underestimated the probative value of prejudicial evidence regarding related bribe payments because the evidence was relevant to make out the elements of the Hobbs Act offense charged); *United States v. Latta*, 629 F. Supp. 493, 497 (D. Del. 1986) (holding that because the evidence established a pattern or common scheme of commercial bribery and because there was no other way for the government to prove the existence of the common scheme, the evidence's probative value outweighed its prejudicial impact).

Because the probative value of the evidence was substantially outweighed by the danger of unfair prejudice, a confusion of the issues, and the misleading of the jury, and because the evidence was so highly inflammatory as to deprive defendant of his right to a fair trial, the district court committed reversible error by admitting evidence regarding to the money found in Williams' home.

CONCLUSION

For all the foregoing reasons, this Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

ALAN L. ZEGAS
Attorney for Petitioner
552 Main Street
Chatham, New Jersey 07928
(973) 701-7080

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AND FILED APRIL 19, 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 97-5462 and 97-5464

UNITED STATES OF AMERICA

v.

WILLIAM F. BRADLEY,
a/k/a FRANKLIN BRADLEY

William F. Bradley,

Appellant in No. 97-5462

UNITED STATES OF AMERICA

v.

JACKIE R. MATTISON,

Appellant in No. 97-5464

On Appeal from the United States District Court
for the District of New Jersey
District Judge: Honorable William G. Bassler
(D.C. Crim. Nos. 96-00052-2 and 96-00052-1)

Argued February 17, 1999

Appendix A

BEFORE: GREENBERG, ROTH, and LOURIE,*
Circuit Judges

(Filed: April 19, 1999)

* * *

OPINION OF THE COURT

GREENBERG, *Circuit Judge.*

I. INTRODUCTION

The case comes on before this court on the appeals of William F. Bradley and Jackie R. Mattison following their convictions for certain offenses in the district court at a two-month trial. We have consolidated their appeals and dispose of both in this opinion.

Mattison was Chief of Staff for Sharpe James, the Mayor of the City of Newark, from approximately 1987 through early 1996, and was also a New Jersey State Assemblyman during that period. As Chief of Staff, Mattison acted as the Mayor's liaison between the City's Business Administrator and its department heads, ran the Mayor's office and agencies, served as liaison with the city council, boards and commissions, acted as the Mayor's representative at business meetings, and served as the

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* Honorable Alan D. Lourie, Circuit Judge of the United States Court of Appeals for the Federal Circuit, sitting by designation.

Mayor's lobbyist in Trenton. The grand jury named Mattison's long-term girlfriend, Janice L. Williams, who was in the hair salon business, as an unindicted co-conspirator. Mattison and Williams together owned a house and shared a rented safe-deposit box. Moreover, Mattison opened bank accounts in Williams' name in trust for their daughter. During the course of the investigation in this case the FBI seized $157,000 in cash from lockboxes in Williams' house and evidence of that seizure was admitted at the trial.

Bradley was an insurance broker/financial consultant in the late 1980s, running a business called Bradley Financial Services from an office in Milburn, New Jersey. Bradley had known Williams, through Mattison, for about 15 years at the time of trial. The evidence at the trial demonstrated that Mattison helped Bradley in his role as a consultant for two companies, Great West Assurance Company and Corroon & Black, to obtain and maintain contracts with the City and the Newark Board of Education. The City chose Great West as a provider of deferred compensation plans for City employees, and the Board of Education chose Corroon to provide insurance with Bradley as its minority subcontractor.

There was evidence that Mattison provided Bradley with official favors with respect to those contracts in return for a series of corrupt payments from Bradley. In particular, Bradley gave two checks payable to Mattison to him, one for $4,457.50 in September 1990 and one for $1,640 in January 1991. Bradley labeled the first check "fees" and the second "consulting." Mattison deposited the first into

his personal bank account and cashed the second. Bradley made three checks payable to Williams for Mattison's direct and indirect benefit. The checks were for $3,600, dated October 8, 1991, $3,600, dated November 13, 1992, and $3,575, dated October 13, 1994. Williams deposited the first check into a new account she opened with the deposit but she added no other deposits to the account. She withdrew the entire balance in a check payable to cash on February 5, 1992. She deposited the second check into her personal checking account, and paid certain of Mattison's bills with it. She deposited the third check into her checking account and, over the next nine days, made cash withdrawals from the account for $2,000, $1,000 and $800.

Thus, Bradley made total payments to Mattison of $16,872.50. Mattison did not reveal the receipt of these payments on financial forms he was required to file by reason of his public positions. Williams testified that the payments Bradley made to her were loans, and Bradley claimed that the first check he wrote to Mattison was a repayment of a loan.

The government demonstrated that Mattison referred Bradley to Great West when it was seeking the contract to provide the City's deferred compensation plan. Bradley, in fact, became Great West's consultant. Mattison also furnished Bradley with information useful to Great West in seeking the contract and Bradley indicated to Great West that Mattison would aid it in winning the contract, which he did. Significantly, the assistance Mattison gave to Bradley included ensuring that a potential competitor did not offer a competing deferred compensation plan to the City.

Appendix A

The evidence showed that the Newark Board of Education was selecting an insurance plan in 1989-90 to cover its buildings and other property. Under applicable rules, Corroon was required to have a minority contractor participating with it and Mattison vouched for Bradley for that role. Corroon paid Bradley an unusually high commission, but Bradley did little work to earn it. A search of Bradley's office revealed correspondence addressed to Mattison, some confidential, pertaining to the Board of Education contract. After Corroon secured the contract in 1990, Bradley was unable to obtain minority certification and lacked malpractice insurance necessary for him to comply with the contract. Nevertheless, through Mattison's intervention, Corroon decided to pay Bradley his commission in September 1991, despite initially stopping payment on a check to him.

Bradley and Williams testified that the various money transfers related to loans, but the government argued that their explanations were not convincing. For example, Williams testified that her loans from Bradley had no terms, and that there were no written records kept about them. Bradley testified that his first check to Mattison was repayment for a loan Mattison had made to him to purchase a co-op, but evidence showed that he borrowed money for that purpose from a woman he was dating. While Bradley stated that he wrote "consulting" on that check so he could deduct it from taxes, he had not filed tax returns since 1989, leading to the tax evasion conviction in the case. Moreover, Bradley was in financial difficulties during this period and thus it is not likely that he would have been in a position to lend Williams money. Furthermore, while Williams stated

the loans were for her hair salon business, the business was not in serious trouble, and she had funds available to her from a City program and in her own accounts. Also, in 1993 when Bradley sought a minority business certification he did not indicate that he had loans receivable as assets.

A grand jury returned a 26-count superseding indictment against Mattison and Bradley. It charged both in counts one through 19 with: conspiracy to accept corrupt payments; accepting money to influence and reward; a scheme to extort money under official right, violating the Hobbs Act; use of a facility in interstate commerce to accept a benefit not allowed by law to influence the performance of Mattison's duties contrary of New Jersey law; and use of mail and wire fraud to deprive the citizens of Newark and New Jersey of their right to honest services of a public official. It charged Bradley separately in seven counts for three offenses: making a false declaration before the grand jury; false use of a social security number; and tax evasion from 1989-1993.

The court dismissed three jurors during and after the summations at the trial. The court dismissed the first, Moldow, to attend a family funeral. The court dismissed the second, Jefferson, one day later, for sleeping. The court dismissed the third because the juror had vacation plans.

During the early stages of the trial, jurors mentioned that Jefferson had an odor problem and the court moved her seat so she was further away from the other jurors. Later the Assistant United States Attorney told the court he thought that Jefferson was eating paper. The jurors,

however, did not make any subsequent complaints regarding odor problems or any other issue concerning Jefferson. When near the end of the trial Moldow brought her request to leave the jury to the court, she asked if the court would dismiss the other alternates. At that time the court asked her if there was something she wanted to tell it. Moldow then stated that she thought Jefferson, who was an alternate, was not a good listener and had made up her mind with respect to the outcome of the case. The court also asked if the odor issue continued. The court told the parties about the situation, and the court placed Moldow under oath for questioning.

Moldow stated that near the start of trial, she had overheard Jefferson during lunch mutter a comment about making up her own mind and not listening to the court. Moldow said the remark shocked her and that she asked Jefferson what she had said, but that Jefferson denied saying anything.

The court then told the parties that it had noticed Jefferson sleeping. It then swore in one of its law clerks, who testified that during the government's closing, she had noticed Jefferson sleeping. The defendants had the opportunity to cross-examine the clerk but did not do so. The court expressed its desire to question Jefferson, but the defendants opposed that procedure. The court then decided to delay questioning her in recognition of her status as an alternate.

Ultimately the court dismissed the juror who had vacation plans. The court then stated that it had observed

that Jefferson was not paying attention during the defendants' summation. The defendants at that time changed their position, and urged the court to examine Jefferson. The court offered to voir dire all jurors about the comment Moldow overheard, but it did not do so. After further discussion, the court dismissed Jefferson without questioning her. We understand that if the court had not excused Jefferson she would have deliberated in this case. Eventually the jury convicted both defendants on all counts.

The court calculated Mattison's guidelines range at 33-41 months, and it sentenced him to 41 months imprisonment on each count to run concurrently, three years' supervised release on each count, also to run concurrently, 400 hours of community service, a fine of $25,000, and special assessment of $950.

Bradley's guidelines range was 46-57 months, and the court sentenced him to concurrent 46-month custodial terms on each count, to three-year terms of concurrent supervised release, a fine of $7,500, and a special assessment of $1,300.

II. DISCUSSION

A. *Whether the district court abused its discretion when it allowed the government to adduce evidence that $157,000 was found in Williams' attic to impeach her testimony.*

On this appeal Mattison has filed briefs in which Bradley has joined. The defendants argue that evidence of the $157,000 recovered from Williams was "highly

inflammatory" and "unfairly prejudicial" and that the jury could not "compartmentalize" the evidence even with the court's limiting instructions. Brief at 22-23. They argue that while no effort was made to link the cash to Mattison, the evidence "powerfully suggested" that Mattison had something to do with it, as it was found in Williams' home. *Id.* at 23.

The government called Williams as a witness following a grant of immunity to her. Testimony demonstrated that the FBI had found the $157,000 in cash in lockboxes in the attic of her house during a November 9, 1995 search made in connection with the investigation against Mattison and Bradley. Williams claimed that she had found the money in her father's house a year after his death, on approximately October 24, 1995, and that she had not put the money in a bank because she was waiting to discuss the matter with a sister. The government stated that the evidence was admissible to impeach Williams' testimony that she had lent money she obtained from Bradley's first loan to her, in 1991, for $3,600, to her father. In this regard, the government suggested that if her father had had so much money, he would not have borrowed from Williams. The government also contended that evidence of the money impeached her testimony that Bradley's three payments to her were loans as Williams did not repay Bradley at the time she found that money. Moreover, it argued that the evidence demonstrated that Williams' grand jury testimony that she withdrew $3,500 in cash in February 1992 for her father was false, and had to be changed at trial where Williams said she gave some money to her father and used some money for personal bills.

The government had a legitimate reason to offer the evidence to attack Williams' credibility. The court gave limiting instructions to the effect that the evidence with respect to the $157,000 was admitted only to impeach Williams, and that the prosecution did not suggest that there was a connection between the cash, the defendants, and any crime.

The court's decision to admit the evidence was proper. *See Carter v. Hewitt*, 617 F.2d 973, 972 (3d Cir. 1980) ("prejudice" entails a determination on "an improper basis of decision"). In making a Fed. R. Evid. 403 determination, the district court is required to balance the probative value of evidence against its prejudicial effect. The district court "must appraise the genuine need for the challenged evidence and balance that necessity against the risk of prejudice to the defendant." *Government of the Virgin Islands v. Archibald*, 987 F.2d 180, 186 (3d Cir. 1993) (internal quotation marks and citations omitted). Here evidence regarding the $157,000 had a legitimate purpose and there was not "an overwhelming probability" that the jury would have been unable to follow the limiting instructions, or "a strong likelihood" that the evidence would be "devastating" to the defendants. *United States v. Vaulin*, 132 F.3d 898, 901 (3d Cir. 1997). In the circumstances, the court did not abuse its discretion in admitting it.

B. *Whether it was proper for the court to dismiss Jefferson for sleeping without a voir dire of her.*

The defendants argue vigorously that the court erred in dismissing Jefferson. We review the court's actions in this

regard for an abuse of discretion. *See United States v. Bertoli*, 40 F.3d 1384, 1392 (3d Cir. 1994).

The court had a legitimate basis to dismiss Jefferson. Under Fed. R. Crim. P. 24(c), a court may dismiss jurors if they "become or are found to be unable or disqualified to perform their duties." The defendants argue that the court's stated reason for dismissing Jefferson, that she was sleeping, was only a "pretext," and that the court and the government had singled her out and were looking for ways to remove her. But the record shows that the court dismissed her for *inability to serve* as a juror, and that the court had sufficient information to support the dismissal and so did not have to voir dire her or the other jurors with respect to this point. *See, e.g., United States v. Bertoli*, 40 F.3d at 1395; *United States v. Reese*, 33 F.3d 166, 173 (2d Cir. 1992).

The defendants downplay the fact that the court itself noticed Jefferson sleeping: first, when it overheard someone snoring loudly during the government's summation, then, when it observed Jefferson snoring during the defendants' summation; thus, its dismissal was not solely based on its law clerk's observations. The court could take judicial notice of the conduct of a juror in open court. *See, e.g., United States v. Carter*, 433 F.2d 874, 876 (10th Cir. 1970). Moreover, the court did not base its decision on ex parte communications with its clerk. Rather, it put the clerk on the stand to be cross-examined. The defendants refused to question the clerk, and now argue that this is because they did not want to risk attacking the court through its extension, the clerk. Yet the defendants' attorneys were quite willing to argue with the court itself regarding its observation that Jefferson was sleeping, and were willing to question whether

the court had observed other jurors sleeping as well. Furthermore, when the court initially offered to voir dire Jefferson the defendants objected to that procedure, stating that at that point she should not be singled out, and that there was no basis for the inquiry.

After the summations, the situation changed. At that point the defendants argued that Jefferson should be examined, along with all other jurors, concerning her potentially prejudicial comment which Moldow overheard. The court offered to do so but after further discussion decided to dismiss Jefferson finding that there was no reason to question her based upon Moldow's testimony of April 16, 1999 because it was clear that Jefferson had not been attentive during the closings and should be dismissed on that basis. We find that the court's procedure was not an abuse of discretion. *See United States v. Console*, 13 F.3d 641, 669 n.34 (3d Cir. 1993).

C. *Whether the court properly instructed the jury on the Hobbs Act.*

The defendants challenge the court's instructions to the jury on the Hobbs Act Count 6 charge for extortion under color of official right, 18 U.S.C. §§ 1951(a)(b)(2) and (3) and 2. They argue that the court improperly refused to charge that in a non-campaign case like this one, an express agreement must be shown.[1] We exercise plenary review on

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1. Campaign contribution cases present special problems because persons who hope that their interests will receive favorable treatment from elected officials legitimately may make campaign contributions to those officials. *See McCormick v. United States*, 500 U.S. 257, 272-73, 111 S.Ct. 1807, 1816 (1991).

this issue. *See Ryder v. Westinghouse Elec. Corp.*, 128 F.3d 128, 135 (3d Cir. 1997); *United States v. Zehrbach*, 47 F.3d 1252, 1260 (3d Cir. 1995).

The court's instruction was as follows:

> So if a public official agrees explicitly or implicitly to take or withhold some action for the purpose of obtaining money for someone else, that constitutes extortion. The public official need not fulfill the promise of the payor to do or not to do an official act, although the official's failure to influence may be considered along with all of his conduct in determining whether or not he possessed the intent to commit the crime. The crime is completed at the time when the public official knowingly accepts the benefit in return for his agreement to perform or not to perform an act related to his office. *Moreover, the government does not have to prove that there was an express promise on the part of the public official to perform a particular act at the time of the payment.*
>
> In sum then, it is sufficient if the public official understands that he is expected, as a result of the payment, to exercise particular kinds of influence or to do certain things connected with his office as specific opportunities arise.

App. at 6269-70 (emphasis added).

As the government argues, this instruction complies with the most recent Supreme Court holding on the issue of whether an agreement is required for conviction under the Hobbs Act. In *Evans v. United States*, 504 U.S. 255, 268, 112 S.Ct. 1881, 1889 (1992), the Supreme Court held that "the [g]overnment need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts," in order to establish extortion under color of official right under the Hobbs Act. Significantly, the Court "reject[ed] petitioner's contention that an affirmative step is an element of the offense of extortion 'under color of official right' and need be included in the instruction." *Id.*

Several courts of appeals also have turned to Justice Kennedy's concurrence in *Evans* to hold specifically that no explicit promise is required. In *Evans*, Justice Kennedy wrote that "[t]he official and the payor need not state the quid pro quo in express terms, for otherwise the law's effect could be frustrated by knowing winks and nods." *Id.* at 274, 112 S.Ct. at 1892 (concurring opinion). The Court of Appeals for the Second Circuit, for example, drawing upon Justice Kennedy's concurrence, has held that, in non-campaign cases, "proof of an explicit promise to perform the official acts in return for the payment is not required." *United States v. Delano*, 55 F.3d 720, 731 (2d Cir. 1995); *see also United States v. Hairston*, 46 F.3d 361, 365 (4th Cir. 1995) (quid pro quo need not be express; government only must show that public official obtained payment to which he was not entitled knowing that payment was in return for official act). Here, the government proved the quid pro quo relationship, though it did not show and did

not have to show that the defendants had an express agreement.

The defendants point to cases from the Court of Appeals for the Eleventh Circuit to support their position. Brief at 36-37. In *United States v. Martinez*, 14 F.3d 543, 552-54 (11th Cir. 1994), the court of appeals held that the district court had failed to instruct the jury on the quid pro quo relationship, which it construed to mean "explicit promise." Yet it noted that in *Evans* the Supreme Court, in discussing an earlier Hobbs Act case, stated that the jury instruction satisfied "the *quid pro quo* requirement of *McCormick* because the offense is completed at the time when the public official receives a payment in return for his agreement to perform specific official acts[.]" *Martinez*, 14 F.3d at 553 (quoting *Evans*, 504 U.S. at 268, 112 S.Ct. at 1889). In *McCormick*, "proof of a quid pro quo" is defined as a "promise of official action or inaction in exchange for any payment or property received." *McCormick v. United States*, 500 U.S. 257, 266, 111 S.Ct. 1807, 1813 (1991). The Court did not in *McCormick*, or later in *Evans*, require an "express" or "explicit" promise in cases such as this involving payments outside of a campaign contribution context. Nevertheless, in *United States v. Davis*, 30 F.3d 108, 109 (11th Cir. 1994), the court of appeals adhered to *Martinez*.

We will not follow the Court of Appeals for the Eleventh Circuit as in our view, as Justice Kennedy explained, a conclusion that in a Hobbs Act case the government has to demonstrate that the public official made an express promise to perform a particular act and that "knowing winks and nods" are not sufficient would frustrate

the act's effect. *Evans*, 504 U.S. at 274, 112 S.Ct. at 1892 (Kennedy, J., concurring). In the circumstances, we conclude that the court's instruction was correct.

D. *Defendants' other arguments.*

The defendants raise the following additional arguments:

> (1) The district court's erroneous interpretation of the Wire and Mail Fraud Act and improper jury charge violated defendants' federal constitutional rights to due process and to a fair trial;
>
> (2) The district court's erroneous interpretation of the New Jersey gratuity law and the improper fashioning of a jury charge based upon an incorrect legal analysis violated defendants' federal constitutional right to due process and to a fair trial;
>
> (3) In violation of defendant Mattison's federal constitutional right to due process and to a fair trial, the district court erred in failing to sever the case against defendant Mattison from the case against defendant Bradley;
>
> (4) Defendant Mattison's federal, constitutional rights to due process and to a fair trial and the rights of defendant Mattison under the Federal Sentencing Guidelines were violated by the

district court's failure to grant him a downward departure at the time of sentencing;

(5) Defendant Mattison's federal constitutional right to due process and to a fair trial and the rights of defendant Mattison under the Federal Sentencing Guidelines were violated by the imposition of a two-point increase under an alleged multiple bribe theory;

(6) Federal constitutional rights to due process and to a fair trial were violated by the district court's failure to grant defendants' motion for judgment of acquittal and motion for a new trial.

We have reviewed these contentions and conclude that they are clearly without merit and thus we reject the contentions without further discussion.

III. CONCLUSION

For the foregoing reasons we will affirm the judgments of conviction and sentence entered July 16, 1997.

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED AND FILED JULY 14, 1997

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Crim. No. 96-52(WGB)

UNITED STATES OF AMERICA,

Plaintiff,

v.

JACKIE R. MATTISON and WILLIAM F. BRADLEY

Defendants.

MEMORANDUM OPINION AND ORDER

* * *

BASSLER, DISTRICT JUDGE:

I. *SENTENCE UNDER THE GUIDELINES*

This opinion addresses the objections and motions for downward departure by Defendant Jackie Mattison. Pursuant to the Presentence Investigative Report, Mattison has an offense level of 20 and a criminal history category of I.

Appendix B

II. *OBJECTIONS*

Mattison argues that the Probation Department wrongly determined that there was more than one bribe, warranting a two point increase in the offense level pursuant to U.S.S.G. § 2C1.1(b)(1). This argument rests on Mattison's viewpoint that the Government contended throughout trial that Mattison and Bradley had an agreement that Bradley would give Mattison thirty percent of his commissions. If Mattison is correct, that these alleged payments made to him were installments under one single bribery agreement, the two point increase would be unwarranted.

Application Note 6 to U.S.S.G. § 2C1.1 states "Section (b)(1) provides an adjustment for offenses involving more than one incident of either bribery or extortion. Related payments that, in essence, constitute a single incident of bribery or extortion (e.g., a number of installment payments for a single action) are to be treated as a single bribe or extortion, even if charged in separate counts." *Id.*

The Government proved, beyond a reasonable doubt, that Bradley rewarded Mattison on at least five occasions, introducing five checks from Bradley to Mattison. These checks were proven to be "rewards" to Mattison which legally constitute bribery. No sufficient evidence exists to prove that these payments were all based on a single incident of bribery. The conclusion that there was more than one bribe is amply supported by the evidence introduced by the Government at trial. This is a sufficient basis for an enhancement of the offense level pursuant to Section 2C1.1(b)(1). *See United States v. Dijan*, 37 F.3d 398, 403 (8th Cir. 1994).

Although payments may be part of a larger conspiracy, they are not necessarily installment payments for a single action. *United States v. Kahlon*, 38 F.3d 467, 470 (9th Cir. 1994). Another circuit held that multiple payments to a public official, even payments in the same amounts, constitute multiple bribes. *United States v. Tejada Beltran*, 50 F.3d 105, 108 (1st Cir. 1995). Alternatively, where payments came in different amounts and in different intervals, another circuit found that there was no error in utilizing the enhancement provision of U.S.S.G. § 2C1.1(b)(1). *United States v. Morales*, 11 F.3d 915 (9th Cir. 1993).

"If additional payments are made to promote different or more work from the bribed official, then the payments are not installment payments but separate bribes." *United States v. Jackson*, 876 F. Supp. 1208, 1213 (D. Kan. 1994), *aff'd* 76 F.3d 1145 (10th Cir. 1996). The record shows that William Bradley paid Jackie Mattison, both directly and indirectly, to help him obtain and maintain the contract with Great West through the Newark Deferred Compensation Committee and with Corroon through the Newark Board of Education. This constitutes payments for at least two different incidents.

III. *DEPARTURE*

The remainder of this opinion addresses Defendant's request that this Court depart downward from the recommended sentence based on his argument that there was "no evidence that Jackie Mattison exercised any influence in exchange for the alleged bribes" and based on

extraordinary circumstances, including family ties, hardship on his family, and civic and military service.

In promulgating the Sentencing Guidelines, the Sentencing Commission intended that sentencing courts would "treat each guideline as carving out a 'heartland,' a set of typical cases embodying the conduct that each guideline describes." *United States v. Benish*, 5 F.3d 20 (3d Cir. 1993), quoting U.S.S.G. Ch. 1, Pt. A, 4(b). A sentencing court may impose a sentence outside the range established by the applicable guidelines if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, *not adequately taken into consideration by the Sentencing Commission* in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b) (1988).

The universe of potential factors to be considered by a sentencing court in determining whether to depart downward is as wide and varied as human nature itself. *United States v. Koon*, 116 S. Ct. 2035 (1996) divides this infinite universe into four categories for purposes of determining whether departure is appropriate pursuant to 18 U.S.C. § 3553(b): (1) forbidden factors[1]; (2) encouraged factors; (3) discouraged factors; and (4) factors that are unmentioned in the Guidelines. *Koon*, 116 S. Ct. at 2045; *United States v. Haut*, 107 F.3d 213, 218 (3d Cir. 1997).

---

1. The forbidden factors are: race, sex, national origin, creed, religion, socio-economic status, lack of guidance as a youth, drug or alcohol dependence, and economic hardship. U.S.S.G. §§ 5H1.10, 5H1.12, 5H1.4 and 5K1.2.

Appendix B

The district court is vested with varying degrees of discretion to depart depending on what type of factor is at issue. In *Koon*, the Supreme Court explained:

> If the special factor is a forbidden factor, the sentencing court cannot use it as a basis for departure. If the special factor is an encouraged factor, the court is authorized to depart if the applicable Guideline does not already take it into account. If the special factor is a discouraged factor, or an encouraged factor already taken into account by the applicable Guideline, the Court should depart only if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present. If a factor is unmentioned in the Guidelines, the Court must, after considering "the structure and theory of both relevant individual guidelines and the Guidelines taken as a whole," decide whether it is sufficient to take the case out of the Guideline's heartland. The Court must bear in mind the Commission's expectation that departures based on grounds not mentioned in the Guidelines will be "highly infrequent." *Koon*, __ U.S. at __, 116 S. Ct. At 2045 (emphasis added) (citations omitted).

See also Haut, 107 F.3d at 218.

"Encouraged factors" offer sentencing courts assistance by setting out a host of considerations that may take a particular case outside the "heartland" of any individual

guideline, thereby warranting a departure. *See* U.S.S.G. § 5K2.0 *et. seq.*; *United States v. Rivera*, 994 F.2d 942, 948 (1st Cir. 1993). "Discouraged factors" are those circumstances enumerated to be "not ordinarily relevant" in determining departures. *See* U.S.S.G. § 5H1.1 *et. seq.*; *Rivera*, 994 F.2d at 948. Discouraged factors include the defendant's education and vocational skills, family ties and responsibilities, and military, civic, or charitable service. *Koon*, 116 S. Ct. at 2045.

Based on this Court's analysis of *Koon* and the cases that have applied *Koon*, the Court rejects Mattison's argument for departure on the basis of failure to exert influence in exchange for the alleged bribes and on the basis of family ties as contrary to the Guidelines and the law of this Circuit and as an argument without merit.

Mattison argues that there was "no evidence that Jackie Mattison exercised any influence in exchange for the alleged bribes." Because he argues that the Sentencing Guidelines are premised upon the exercise of an actual influence and an explicit quid pro quo, Mattison argues that this Court should depart downward.

Mattison has not provided any legal justification for the Court to reach this determination. In fact, this Court held during the trial:

> This Court will follow the majority of circuits that have found *Evans* to be controlling in non-campaign contribution cases under the Hobbs Act. In *Evans*, the Supreme Court held that in a Hobbs Act case, the government must

> show "that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." *Evans*, 112 S. Ct. at 1889. The Court finds that this "knowing" standard is the limited quid pro quo that must be met in order to sustain a Hobbs Act conviction.

Mattison has provided no legal authority that stands for the proposition that the limited quid pro quo standard the Court found controlling under the Hobbs Act does not also control for purposes of sentencing. Therefore, the Court denies Mattison's motion for a downward departure on this basis.

Additionally, Mattison's other arguments for departure based on extraordinary circumstances fail. Mattison argues for a downward departure from the Guidelines due to his family ties. However, this is a discouraged factor under *Koon*. As a discouraged factor, the Court finds that Mattison's argument fails because it does not present atypical family circumstances. Though courts do have the power to depart downward on the basis of family circumstances pursuant to U.S.S.G. § 5H1.6, such departures may occur only when the Court finds that extraordinary circumstances exist. As the Third Circuit has noted, "[f]amily ties and responsibilities . . . are not ordinarily relevant in determining whether a sentence should be outside the guidelines." *United States v. Headley*, 923 F.2d 1079, 1082-83 (3d Cir. 1991). In essence, departure is only appropriate for an atypical case. *See United States v. Monaco*, 23 F.3d 793 (3d Cir. 1994); *United States v. Bierley*, 922 F.2d 1061 (3d Cir. 1990); *United States v. Ryan*, 866 F.2d 604 (3d Cir. 1989).

Appendix B

Mattison additionally argues that he has two separate families to support, families which would suffer great hardships from his absence. According to U.S.S.G. § 5H1.6, "[f]amily ties and responsibilities and community ties are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range." Therefore, the Court cannot consider the hardship on Mattison's families.

Furthermore, Mattison also urges the Court to depart from the Guidelines based on his "unblemished prior record, coupled with his family commitments, [and] service in the military." Pursuant to U.S.S.G. § 5H1.11, "[m]ilitary, civic, charitable, or public service; employment-related contributions; and similar prior good works are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range." Therefore, Mattison's military, civic, and public service are disfavored factors upon which to depart under *Koon*, and the Court sees no basis upon which to justify a departure.

This Court is unconvinced that Mattison presents any circumstances that rise to the level of atypical circumstances. Because the Court does not find that Mattison's case presents atypical circumstances, the Court denies the application to depart downward from the Guidelines.

s/ William G. Bassler
William G. Bassler, U.S.D.J.

Dated: July 14, 1997

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED AND FILED JULY 14, 1997

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Case Number: 96-52-01

UNITED STATES OF AMERICA

VS.

JACKIE MATTISON
(Defendant's Name)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

THOMAS ASHLEY, ESQ.
Attorney's Name

THE DEFENDANT:

* * *

X was found guilty on count(s) ONE THRU NINETEEN (1-19) OF SUPERSEDING INDICTMENT ON March 21, 1997 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s) which involve the following offenses:

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TITLE SECTION	NATURE OF OFFENSE	DATE OF OFFENSE	COUNTS
18:371	CONSPIRACY	MARCH 1989	1
18:666 (a)(1)(B)	BRIBERY	[redacted]	2-5
18:1951(a) (b)(2)(3) & 2	EXTORTION	[redacted]	6
18:1952 (a)(1)(3)	RACKETEERING-BRIBERY	[redacted]	7-12
18:1341 & 2	FRAUDS & SWINDELS (MAIL)	[redacted]	13-19
18:1343 & 2			
18:1346 & 2			

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.,

* * *

Appendix C

X It is ordered that the defendant shall pay a special assessment of $50.00, for count(s) 1 THRU 19 FOR A TOTAL OF $950.00, which shall be due immediately

* * *

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.:
251-82-8275

Defendant's Date of Birth:
5-8-50

14 JULY 1997
Date of Imposition of Sentence

Defendant's Address:
151 KERR AVENUE
NEWARK, N.J. 07112

s/ William G. Bassler
Signature of Judicial Officer

WILLIAM G. BASSLER, U.S.D.J.
Name & Title of Judicial Officer

DATE: 14 JULY 1997

Appendix C

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of prisons to be imprisoned for a term of 41 MONTHS ON EACH OF CT'S 1,2,3,4,5,6,7,8,9, 10,11,12,13,14,15,16,17,18 & 19 TO RUN CONCURRENT WITH EACH OTHER.

_X_ The court makes the following recommendations to the Bureau of Prisons: ALLENWOOD F.P.C. & INMATE FINANCIAL RESPONSIBILITY PROGRAM

* * *

_X_ as notified by the probation office.

* * *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 YEARS ON EACH OF CT's 1,2,3,4,5,6,7,8,9,10,11,12,13,14,15,16,17,18 & 19 TO RUN CONCURRENT WITH EACH OTHER..

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a conditions of supervised release that the defendant pay any such restitution that

remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

X The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

X The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

X The defendant shall not possess a firearm or destructive device.

1. The defendant shall contribute 400 hours of community service work over a period of 3 Years or less, from the date supervised release commences. Such service shall be without compensation, with the specific work placement to be approved by the probation office. Court recommends Share at 436 Ferry Street Newark, N.J.

2. The defendant shall provide the U.S. Probation Office with full disclosure of his financial records to include yearly income tax returns upon the request of the U.S. Probation Office. The defendant shall cooperate with the probation officer in the investigation of his financial dealings and shall provide truthful monthly statements of his income.

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STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquires by the probation officer and follow tile instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer with 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related

to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrest or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record of personal history of characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Appendix C

FINE

The defendant shall pay a fine of $25,000.00. The fine includes any costs of incarceration and/or supervision.

* * *

This fine plus interest required shall be paid:

X in full immediately.

* * *

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

STATEMENT OF REASONS

X The court adopts the factual findings and guideline application in the presentence report.

* * *

Appendix C

Guideline Range Determined by the Court:

Total Offense Level: 20

Criminal History Category: I

Imprisonment Range: 33 to 41 months

Supervised Release Range: 2 to 3 years

Fine Range: $7,500.00 to $75,000.00

* * *

X The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

* * * *

APPENDIX D — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED AND FILED MARCH 14, 1997

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Crim. No. 96-52(WGB)

UNITED STATES OF AMERICA,

Plaintiff,

v.

JACKIE R. MATTISON and
WILLIAM F. BRADLEY

Defendants.

MEMORANDUM OPINION AND ORDER

* * *

BASSLER, DISTRICT JUDGE:

This opinion addresses the Government's motion for the Court to remove Ms. Ella Jefferson, Alternate Juror #1. Pursuant to Federal Rule of Criminal Procedure 24(c), a trial court has the authority to "replace jurors, who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties." Fed.R.Crim.P. 24(c). In applying Rule 24(c), the Third Circuit held that:

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> [T]he trial judge, in his sound discretion, may remove a juror and replace him with an alternate juror whenever facts are presented which convince the trial judge that the juror's ability to perform his duty as a juror is impaired.

United States v. Cameron, 464 F.2d 333, 335 (3d Cir. 1972).

In *Cameron*, the Third Circuit found "[w]e have no doubt that a juror who cannot remain awake during much of the trial is unable to perform his duty, and the Court did not abuse its discretion in removing the juror in the circumstances presented here." *Id.* Where the trial judge made a finding on the record that the juror was observed to be asleep by the Court and did not appear to be following the evidence, the Third Circuit affirmed the trial judge's decision to remove the sleeping juror.

The Firth Circuit joined the Third Circuit in this conclusion in *United States v. Smith*, 550 F.2d 277 (5th Cir.), *cert. denied sub nom*, *Wallace v. United States*, 434 U.S. 841 (1977). In *Smith*, the Fifth Circuit held that no error existed where the trial judge dismissed two of the regular jurors due to the judge's belief that they had been sleeping. *Id.*, at 285-286.

The Sixth Circuit also affirmed a trial judge's decision to remove a juror for napping in *United States v. Warner*, 690 F.2d 545 (6th Cir. 1982). The Sixth Circuit found that "Rule 24(c) authorizes the dismissal of sleeping jurors, since a juror who sleeps through much of the trial testimony cannot be expected to perform his duties." *Id.*, at 555.

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On several occasions, the government's counsel have argued to the Court that they have observed Ms. Jefferson sleeping.

During an *in camera* hearing to resolve other issues, the Court took under oath the testimony of his law clerk, Sheri Rabiner. Ms. Rabiner, on March 11, 1997, observed Ms. Jefferson sleeping during closing argument of government counsel Mr. James Nobile. Although the Court previously noted Ms. Jefferson's hooded eyes that gave the appearance of sleeping, Ms. Rabiner noted that during closing argument, Jefferson actually began to snore. Her snoring was so distracting that Juror #1 had to reach over and shake her arm to wake her up.

As a result of this issue, the Court on March 13, 1997 carefully observed Ms. Jefferson. During the closing argument of Mr. Thomas Ashley, counsel for Defendant Mattison, the Court observed Ms. Jefferson's head nodding 15 times from 2:30-3:45. Her eyes were not just resting. It was apparent that she was nodding off and was not following the argument.

The Court now is concerned that she may very well not have been following the testimony. There is no question that she was not following the closing arguments.

This Court has carefully observed Alternate Juror #1, Ms. Ella Jefferson, on March 13, 1997, with her eyes closed. "When facts arise before the start of deliberations that cast doubt on a juror's ability to perform her duties, the district court bears discretion to excuse the juror and replace her

with an alternate." *United States v. Smith*, 918 F.2d 1501, 1512 (11th Cir. 1990) (citations omitted). Based on the authority granted a trial judge pursuant to Rule 24(c), this Court finds that Ms. Jefferson is unable to effectively perform her duty as a juror due to her napping during the argument. The Court finds no prejudice to the Defendants in dismissing Ms. Jefferson. Although the Defendants have not articulated their concern, it is apparent to the Court that Defendants want to keep Ms. Jefferson as an alternate juror due to the fact that she is African-American. However, due to the fact that there are four other African-Americans on the jury and the fact that she did not appear to be following the arguments and possibly the testimony, this Court finds that there is no prejudice to the Defendants in dismissing Ms. Jefferson. Therefore, this Court hereby **dismisses** Alternative Juror #1, Ms. Ella Jefferson.

Because of this finding, the Court need not address the other issue of whether Ms. Jefferson had previously made up her mind on any of the issues in this case, a concern raised Alternate Juror #4.

SO ORDERED.

s/ William G. Bassler
William G. Bassler, U.S.D.J.

Dated: 3/14/97

APPENDIX E — MEMORANDUM OPINION OF THE UNTIED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED MARCH 4, 1997

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Crim. No. 96-52(WGB)

UNITED STATES OF AMERICA,

Plaintiff,

v.

JACKIE R. MATTISON and
WILLIAM F. BRADLEY

Defendants.

MEMORANDUM OPINION

* * *

BASSLER, DISTRICT JUDGE:

This opinion addresses the Defendants' motions for judgment of acquittal on Counts 13-19 of the Superseding Indictment (the mail/wire fraud honest services counts).

The mail fraud statute has had an interesting history. Until 1987, all twelve circuits had held that the deprivation of honest services constituted a fraud under the federal mail fraud statute, 18 U.S.C. § 1341. In 1987, in *United States*

v. McNally, 483 U.S. 350 (1987), the Supreme Court held that the mail fraud statute prohibited a scheme to defraud the victimized public of actual property, not of the intangible right to the honest services of the public employee. *Id.* Congress responded quickly by reversing the *McNally* decision in November, 1988, with the passage of 18 U.S.C. § 1346, which provides "For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." See 18 U.S.C. § 1346.

Recently, the Third Circuit held that the essential elements of the crime of mail fraud include:

(1) A scheme or artifice to defraud;

(2) Participation by the defendant with specific intent to defraud.

(3) Use of the mail in furtherance of the scheme.

United States v. Copple, 24 F.3d 535, 544 (3d Cir. 1994), citing *United States v. Burks*, 867 F.2d 795 (3d Cir. 1989). "To find a violation of the mail fraud statute . . . the charged 'mailings' must be 'for the purpose of executing the scheme.' " *United States v. Lane*, 474 U.S. 438, 451 (1986), quoting *Kann v. United State*s, 323 U.S. 88, 94 (1944).

"Before *McNally*, federal courts had uniformly construed the mail fraud statute to cover the situation where public officials received bribes and kickbacks thereby depriving the citizenry of their 'intangible rights' to good

and honest government." *United States v. Paradies*, 98 F.3d 1266, 1283 n.30 (11th Cir. 1996), citing *United States v. Holzer*, 816 F.2d 304 (7th Cir.) *rev'd*, 828 F.2d 21 (7th Cir. 1987), *cert. denied*, 484 U.S. 1076 (1988); *United States v. Silvano*, 812 F.2d 754 (1st Cir. 1987); *United States v. Clapps*, 732 F.2d 1148 (3d Cir.), *cert. denied*, 469 U.S. 1085 (1984); *United States v. Barber*, 668 F.2d 778 (4th Cir.), *cert. denied*, 459 U.S. 829 (1982); *United States v. Margiotta*, 688 F.2d 108 (2d Cir. 1982), *cert. denied*, 461 U.S. 913 (1983); *United States v. Diggs*, 613 F.2d 988 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 982 (1980); *United States v. States*, 488 F.2d 761 (8th Cir.), *cert. denied*, 417 U.S. 909 (1974); *Shushan United States*, 117 F.2d 110 (5th Cir. 1941); *cert. denied*, 313 U.S. 574 (1941).

Post-*McNally* decisions have construed §§ 1341 and 1346 as proscribing schemes to deprive another individual of honest services, consistent with the pre-*McNally* interpretation of 18 U.S.C. § 1341. *United States v. Bissell*, 1996 WL 754808, *12 (D.N.J. 1996), citing *Grandmaison*, 77 F.3d 555; *United States v. Bryan*, 58 F.3d 933 (4th Cir. 1995); *Waymer*, 55 F.3d 564; *United States v. Evans*, 30 F.3d 1015 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1383 (1995).

"Proof of actual loss by the intended victim is not necessary." *Copple*, 24 F.3d at 544, citing *United States v. Kelley*, 929 F.2d 582, 585 (10th Cir.), *cert. denied*, 112 S. Ct. 341 (1991); *United States v. King*, 860 F.2d 54, 55 (2d Cir. 1988), *cert. denied*, 490 U.S. 1065 (1989). The Third Circuit explicitly held that "the government does not have to show that the victims actually suffered a loss to

satisfy the elements of the mail fraud statute." *Copple*, 24 F.3d at 544.

Numerous courts have also found that failure of a public official to reveal a conflict of interest may constitute mail fraud under Section 1346. *United States v. Grandmaison*, 77 F.3d 555, 566 (1st Cir. 1996); *See also United States v. Bryan*, 58 F.3d 933 (4th Cir. 1995); *United States v. Alkins*, 925 F.2d 541 (2d Cir. 1991).

There have been a few aberrational cases that have found that "[t]he broad scope of the mail fraud statute, however, does not encompass every instance official misconduct that results in the official's personal gain." *United States v. Sawyer*, 85 F.3d 713 (1st Cir. 1996). For example, in *United States v. McNieve*, 536 F.2d 1245 (8th Cir. 1976), the fact that chief plumbing inspector for the city accepted unsolicited $5 gratuities from plumbing contractors was found not to constitute a scheme involving nor contemplating the deprivation of his honest services to the city or public. *Id.*, at 1251. Additionally, the Eighth Circuit held that a State Representative's acceptance of commissions on state architectural contracts awarded to an architectural firm he recommended to the state officials responsible for awarding such contracts did not establish of itself a violation of the Federal mail fraud statute. *United States v. Rabbit*, 583 F.2d 1014, 1025-36 (8th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979).

This Court finds that these cases are outliers among a large body of case law on the mail fraud statute. Many courts have not bothered to distinguish *Rabbitt* and *McNieve*.

However, the Seventh Circuit found that the *Rabbitt* decision was distinguishable, finding that "[t]he defendant's argument that in the absence of the mayor not actually performing some official act (not casting a vote) there is no violation of the statute is not convincing." *United States v. Lovett*, 811 F.2d 979, 985 (7th Cir. 1987). The Seventh Circuit noted:

> Since the gravamen of the offense is a 'scheme to defraud,' it is unnecessary that the Government allege or prove that the victim of the scheme was actually defrauded or suffered a loss . . . If there was intent on the part of a schemer to deprive Zenith of Yonan's honest and loyal services in the form of his giving [the defendant] preferential treatment, it is simply beside the point that Yonan may not have had to (or had occasion to) exert special in favor of [the defendant] . . . As the Court noted in *Shushan v. United States*, 117 F.2d 110, 115 (5th Cir. 1941), *certiorari denied*, 313 U.S. 574, 61 S. Ct. 1085, 85 L.Ed. 1531: 'The fact that the official who is bribed is only one of several and could not award the contract by himself does not change the character of the scheme where he is expected to have influence enough to secure the end in view.'

Lovett, 811 F.2d at 985-986, citing *United States v. George*, 477 F.2d 508, 512 (7th Cir. 1983).

The overwhelming majority of case law provides that the mail fraud statute applies to a situation in which a public

official receives a bribe or a kickback depriving the public of their "intangible rights" to honest government services. Furthermore, the Third Circuit does not require proof of a "loss" in a mail fraud charge. Therefore, the Defendants' motions for judgment of acquittal on Counts 13-19 are denied.

s/ William G. Bassler
William G. Bassler, U.S.D.J.

Dated: 3/4/97

APPENDIX F — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED APRIL 19, 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 97-5462 and 97-5464

UNITED STATES OF AMERICA

v.

WILLIAM F. BRADLEY,
a/k/a FRANKLIN BRADLEY

William F. Bradley,

Appellant in No. 97-5462

UNITED STATES OF AMERICA

v.

JACKIE R. MATTISON,

Appellant in No. 97-5464

On Appeal from the United States District Court
for the District of New Jersey
District Judge: Honorable William G. Bassler
(D.C. Crim. Nos. 96-00052-2 and 96-00052-1)

Argued February 17, 1999

Appendix F

BEFORE: GREENBERG, ROTH, AND LOURIE,*
Circuit Judges

Present: Greenberg, Roth, and Lourie, *Circuit Judges*

JUDGMENT

These causes came on to be heard on the record from the United States District Court for the District of New Jersey and were argued by counsel on February 17, 1999.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court entered July 16, 1997, be, and the same are hereby affirmed. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ P. Douglas Sisk
Clerk

Dated: APR 19 1999

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* Honorable Alan D. Lourie, Circuit Judge of the United States Court of Appeals for the Federal Circuit, sitting by designation.

APPENDIX G — CONSTITUTIONAL PROVISIONS, STATUTES AND RULE INVOLVED

FIFTH AMENDMENT

No Person shall be held to answer for a capital, or otherwise infamous crime . . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. . . .

* * *

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .

* * *

FOURTEENTH AMENDMENT

. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Appendix G

18 U.S.C. § 1951

18 U.S.C. Sec. 1951:

(a) Whoever in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section —

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

* * *

18 U.S.C. § 1346

18 U.S.C. Sec. 1346:

For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

* * *

18 U.S.C. § 1343

18 U.S.C. Sec. 1343:

Whoever, having desired or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to

be transmitted by means of wire, radio, television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

* * *

18 U.S.C. § 1952

18 U.S.C. Sec. 1952:

> (a) Whoever travels in interstate or foreign commerce uses the mail or any facility in interstate or foreign commerce, with intent to —
>
> > (1) distribute the proceeds of any unlawful activity; or
> >
> > (2) commit any crime of violence to further any unlawful activity; or
> >
> > (3) otherwise promote, manage, establish, carry on or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform —
> >
> > > (A) an act described in paragraph (1) or (3) shall be fined

under this title, imprisoned not more than 5 years, or both; or

(B) an act described in paragraph (2) shall be fined under this title, imprisoned for not more than 20 years, or both, and if death results shall be imprisoned for any term of years or for life.

(b) As used in this section (i) "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States, or (3) any act which is indictable under subchapter II of chapter 53 of title 31, United States Code, or under section 1956 or 1957 of this title and (ii) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

* * *

Appendix G

N.J.S.A. 2C:27-6(a)

N.J.S.A. 2C:27-6(a):

A public servant commits a crime if he, knowingly and under color of his office, directly or indirectly solicits, accepts or agrees to accept any benefit not allowed by law to influence the performance of his official duties.

* * *

Fed. R. Evid. 403

Rule 403:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

* * * *

Supreme Court, U.S.
FILED
SEP 20 1999
OFFICE OF THE CLERK

No. 99-141

In the Supreme Court of the United States

JACKIE R. MATTISON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record

JAMES K. ROBINSON
Assistant Attorney General

WILLIAM C. BROWN
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district court erred in excusing a juror it observed sleeping during closing argument.

2. Whether the district court committed plain error in instructing the jury regarding the requirements for establishing a violation of a New Jersey illegal gratuity statute, N.J. Stat. Ann. § 2C:27-6 (West 1995).

3. Whether the jury was properly instructed on the charge of extortion under color of official right (18 U.S.C. 1951).

4. Whether, in a prosecution of a public official on charges of mail fraud and wire fraud involving a scheme to defraud the public of its intangible right to honest services, the district court erred in declining to instruct the jury that the government must show that "actual harm or injury" was contemplated by the public official.

5. Whether the district court erred in admitting evidence that $157,000 in cash was found in the home of petitioner's girlfriend.

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In the Supreme Court of the United States

No. 99-141

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 173 F.3d 225. The memorandum opinions and orders of the district court (Pet. App. 18a-25a, 35a-38a, 39a-44a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 45a-46a) was entered on April 19, 1999. The petition for a writ of certiorari was filed on July 19, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted of four counts of bribery concerning programs receiving federal funds, in violation of 18 U.S.C.

666(a)(1)(B), of conspiring to commit that offense, in violation of 18 U.S.C. 371, of extortion under color of official right, in violation of 18 U.S.C. 1951, of six counts of using a facility in interstate commerce to distribute the proceeds of an unlawful activity and to carry on an unlawful activity, in violation of 18 U.S.C. 1952(a)(1) and (a)(3), and of seven counts of wire fraud and mail fraud, in violation of 18 U.S.C. 1341 and 1343. Pet. App. 26a-27a; C.A. App. 26-52. Petitioner was sentenced to 41 months' imprisonment, to be followed by a term of three years' supervised release, and fined $25,000. Pet. App. 26a-33a. The court of appeals affirmed. *Id.* at 1a-17a.

1. Petitioner was Chief of Staff for Sharpe James, the Mayor of the City of Newark, between 1987 and early 1996; he was also a New Jersey State Assemblyman during that period. Pet. App. 2a. As Chief of Staff, petitioner acted as the Mayor's liaison between the City's Business Administrator and its department heads, ran the Mayor's office and agencies, served as liaison with the city council, boards and commissions, and acted as the Mayor's representative at business meetings. *Ibid.*

This case arises out of petitioner's decision to provide co-defendant William Bradley, an insurance broker and financial consultant, with official favors in connection with Bradley's role as a consultant for two companies, Great West Assurance Company (Great West) and Corroon & Black (Corroon), that were seeking contracts with the City. Pet. App. 3a. In return for those favors, petitioner received a series of corrupt payments from Bradley. *Ibid.* The City chose Great West as a provider of deferred compensation plans for City employees, and the Newark Board of Education chose

Corroon to provide insurance with Bradley as its minority subcontractor. *Ibid.*

The evidence at trial showed that, when Great West was seeking a contract to provide the City's deferred compensation plan, petitioner referred Bradley to Great West; Bradley then became Great West's consultant. Bradley indicated to Great West that petitioner would aid it in winning the contract, which he did. Petitioner furnished Bradley with information useful to Great West in seeking the contracts and acted to ensure that a potential competitor would not offer a competing deferred compensation plan to the City. Pet. App. 4a.

The pattern with respect to Corroon was similar. The Newark Board of Education was selecting an insurance plan to cover its buildings and other property. Under the applicable rules, proposed bidders were required to have a minority contractor participating with it. Petitioner recommended Bradley to Corroon for that role. Corroon paid Bradley an unusually high commission, but Bradley did little work to earn it. A search of Bradley's office revealed correspondence addressed to petitioner, some confidential, pertaining to the Board of Education contract. Corroon secured the contract in 1990. After Corroon obtained the contract, however, it became apparent that Bradley was unable to obtain minority certification and lacked malpractice insurance necessary for him to comply with the contract; Corroon stopped payment on a check to Bradley as a result. Petitioner intervened in the matter and Corroon paid Bradley his commission. Pet. App. 5a.

During the relevant time period, Bradley paid petitioner a total of $16,872.50. Pet. App. 4a. Bradley made two payments directly to petitioner—a check for $4457.50 in September 1990 and a check for $1640 in

January 1991. *Id.* at 3a. Bradley also made three indirect payments to petitioner between 1992 and 1994, each in the amount of approximately $3600, by writing checks to petitioner's long-term girlfriend, Janice Williams. *Id.* at 3a-4a. Petitioner did not reveal his receipt of any of Bradley's payments on the financial forms he was required to file by reason of his public positions. *Id.* at 4a.

2. After the jury found him guilty and the court sentenced him, petitioner appealed, and the court of appeals affirmed. Pet. App. 1a-17a.

a. On appeal, petitioner argued that the district court abused its discretion in allowing the government to impeach the testimony of Janice Williams, petitioner's girlfriend, by introducing evidence that $157,000 in cash was found in her attic in 1995. Pet. App. 8a-10a. The government had called Williams as a witness after granting her immunity. *Id.* at 9a. Williams, however, testified favorably for petitioner. She claimed that the checks Bradley wrote her were loans to her, not payments to petitioner; she further testified that, in 1991, she loaned her father the proceeds of Bradley's first $3600 loan. *Id.* at 5a, 9a. Williams also testified that she had found the $157,000 in her father's house a year after his 1994 death. Gov't C.A. Br. 20.

The court of appeals held that the government "had a legitimate reason to offer the evidence" of the $157,000 "to attack Williams' credibility." Pet. App. 10a. It noted: (1) that if Williams' father had so much money, he would not have borrowed money from Williams in 1991; (2) that the evidence of the money impeached Williams' testimony that Bradley's three payments to her were loans because Williams did not repay Bradley when she found the $157,000; and (3) that the $157,000 suggested that Williams had testified falsely when she

claimed that she had withdrawn $3500 in cash from her bank account for her father in February 1992. *Id.* at 9a-10a. The prosecution, moreover, did not suggest to the jury that there was a connection between petitioner and the $157,000, and the jury was instructed that the evidence of the $157,000 was admitted only to impeach Williams. Under those circumstances, the court of appeals concluded, the admission of the evidence was not an abuse of discretion. *Id.* at 10a.

b. The court of appeals also rejected petitioner's argument that the district court erred in dismissing juror Ella Jefferson after the court and its law clerk saw Jefferson sleeping during the summations of counsel. Pet. App. 10a-12a. Noting that a trial court may dismiss jurors pursuant to Rule 24(c) of the Federal Rules of Criminal Procedure if they "become or are found to be unable or disqualified to perform their duties," the court of appeals agreed that it was not an abuse of discretion to dismiss the sleeping juror as unable to serve. *Ibid.*

c. The court also rejected petitioner's argument that the instruction pertaining to the Hobbs Act charge of extortion under color of official right, in violation of 18 U.S.C. 1951, was incorrect. Pet. App. 12a-16a. Petitioner argued that the instruction erroneously omitted a requirement that the government prove the existence of an "express agreement." The instruction given by the district court, the court of appeals held, was consistent with *Evans* v. *United States*, 504 U.S. 255 (1992). There, this Court held that proof of extortion under color of official right under the Hobbs Act requires "only" a "show[ing] that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." Pet. App. 14a (quoting *Evans*, 504 U.S. at 268).

d. Finally, the court of appeals rejected petitioner's additional arguments, without further discussion, as clearly without merit. Pet. App. 16a-17a.

ARGUMENT

1. Petitioner first contends that the district court violated his due process rights by removing alternate juror Ella Jefferson from the jury before deliberations.[1] Pet. 5-15. That fact-bound claim does not warrant further review.

As the court of appeals held, the fact that Jefferson was sleeping during closing arguments was "a legitimate basis to dismiss Jefferson." Pet. App. 11a. Rule 24(c) of the Federal Rules of Criminal Procedure permits a district court to excuse jurors who "become or are found to be unable or disqualified to perform their duties." Courts have agreed that Rule 24(c) authorizes the removal of jurors who sleep through important portions of the trial. Pet. App. 11a-12a. See, *e.g.*, *United States* v. *Warner*, 690 F.2d 545, 555 (6th Cir. 1982); *United States* v. *Smith*, 550 F.2d 277, 285 (5th Cir.), cert. denied, 434 U.S. 841 (1977); *United States* v. *Cameron*, 464 F.2d 333, 335 (3d Cir. 1972).

a. Petitioner does not dispute that a district court may properly exercise its discretion to excuse a juror who has slept during closing arguments. Nor does he dispute that, in a detailed memorandum explaining its reasons for dismissing juror Jefferson, the district court expressly stated that it was dismissing her for sleeping

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[1] Jefferson is identified by petitioner as "Alternate Juror Number 1." Pet. 5-11. Although Jefferson was an alternate juror, other jurors were excused and the court of appeals decided the case under the assumption that she would have deliberated if she had not been removed by the district court. See Pet. App. 8a.

during the trial.[2] Petitioner argues, however, that the trial court's real reason for disqualifying juror Jefferson was that she may have "expressed an opinion and had discussed her view of the case with other jurors." Pet. 10-11. If Jefferson's opinions or statements were the real ground for her removal, petitioner argues, the district court was required to conduct an inquiry into those alleged statements. Pet. 10-15 (citing *United States* v. *Resko*, 3 F.3d 684 (3d Cir. 1993)). That fact-bound claim of pretext, however, was properly rejected by the court of appeals, Pet. App. 11a, in light of the abundant record evidence and specific factual findings showing that juror Jefferson was removed for sleeping during trial, see note 2, *supra*.

b. Petitioner also suggests (Pet. 12) that the district court erred in relying on its law clerk's observation that Jefferson slept during closing arguments. The district court, however, did not base its decision on ex parte communications with its law clerk. Rather, the law clerk testified at a hearing and was subject to cross-

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[2] In its memorandum opinion, the district court noted that government counsel had reported seeing Jefferson sleeping during the trial, and that the court's law clerk had testified that she too saw Jefferson sleeping and snoring during the government's closing argument. Pet. App. 37a. The district court reported that it observed Jefferson sleeping during the summations of defense counsel later on. *Ibid.* The district court expressed concern that Jefferson "may very well not have been following the testimony" and found that "[t]here is no question that she was not following the closing arguments." *Ibid.* The district court therefore ruled that Jefferson would be excused pursuant to Rule 24(c) as "unable to effectively perform her duty as a juror due to her napping during the argument." *Id.* at 38a. Because Jefferson was excused on that ground, the district court expressly declined to address "whether Ms. Jefferson had previously made up her mind on any of the issues in this case." *Ibid.*

examination. Pet. App. 11a. Moreover, as the court of appeals recognized, the district court itself observed Jefferson sleeping, and it could properly take judicial notice of the conduct of a juror in open court. *Ibid.* (citing *United States* v. *Carter*, 433 F.2d 874, 876 (10th Cir. 1970)).

2. Petitioner next contends that the district court erroneously instructed the jury on a New Jersey statute governing gifts to public servants, N.J. Stat. Ann. § 2C:27-6 (West 1995). Pet. 15-19.[3] The propriety of

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[3] The New Jersey statute was relevant to petitioner's convictions under 18 U.S.C. 1952 on counts seven through twelve. Those counts charged the use of a facility in interstate commerce to distribute the proceeds of an unlawful activity and to carry on an unlawful activity. The unlawful activity here was the acceptance of a benefit not allowed by state law (N.J. Stat. Ann. § 2C:27-6(a)) to influence the performance of petitioner's official duties. C.A. App. 46-49. The New Jersey statute provides in pertinent part:

2C:27-6. Gifts to public servants—

> a. A public servant commits a crime if he, knowingly and under color of his office, directly or indirectly solicits, accepts or agrees to accept any benefit not allowed by law to influence the performance of his official duties.
>
> b. A person commits a crime if he, directly or indirectly, confers or agrees to confer any benefit not allowed by law to a public servant to influence the performance of his official duties.
>
> c. In any prosecution under this section, the capacity to influence a public servant in the performance of his official duties may be presumed when the value of the benefit involved, the interests of the person who offers, confers or agrees to confer such benefit, and the duties of the public servant are such as to create a reasonable likelihood that the public servant would perform his official duties in a biased or partial manner.

instructions on the content of a *state* gratuity law does not warrant this Court's review. See *Salve Regina College* v. *Russell*, 499 U.S. 225, 235 n.3 (1991). Moreover, because petitioner did not object to the instructions in the district court (see Gov't C.A. Br. 47 n.10; C.A. App. 5508, 5549-5554, 6652-6656), the claim is reviewable only for plain error. See *United States* v. *Olano*, 507 U.S. 725 (1993). Here, there was no error, plain or otherwise.

Petitioner's primary concern seems to be the instruction that the government "does not have to produce express testimony from the giver, taker, or another, that the benefit was given to influence official duties." Pet. 16. He likewise objects to the instruction that "when the benefit's value is great enough, and the taker is in a position to act in his official capacity to help or hurt the giver of the benefit, * * * you may infer that the benefit was accepted to influence the public servant with respect to his duties." *Ibid.* Those instructions, however, correctly state New Jersey law. The language of Section 2C:27-6 does not require "express testimony" regarding a public official's intent or agreement. To the contrary, Section 2C:27-6(c) authorizes the very inference the jury instructions mention.

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d. This section shall not apply to:

(1) Fees prescribed by law to be received by a public servant, or any other benefit to which he is otherwise legally entitled; or

(2) Gifts or other benefits conferred on account of kinship or other personal, professional or business relationship independent of the official status of the recipient; or

(3) Trivial benefits the receipt of which involve no risk that the public servant would perform his official duties in a biased or partial manner.

"[T]he capacity to influence a public servant * * * may be presumed when the value of the benefit involved, the interests of the person who offers [or] confers * * * such benefit, and the duties of the public servant are such as to create a reasonable likelihood that the public servant would perform his official duties in a biased or partial manner." N.J. Stat. Ann. § 2C:27-6(c) (West 1995).

Nor does New Jersey case law require testimony that the purpose of the gift was to influence the public servant. *State* v. *Savoie*, 341 A.2d 598 (N.J. 1975), on which petitioner relies, involved a prosecution under a different statute, now-repealed N.J. Stat. Ann. § 2A:105-1, rather than Section 2C:27-6. Moreover, the conviction in *Savoie* itself was reversed because, unlike here, the trial court's instructions would have allowed the defendant to be convicted even if the jury believed that the payment was "a pure gift," *i.e.*, that it was not intended to influence, and was not perceived as being intended to influence, the public officer's performance of his duties. *Savoie*, 341 A.2d at 605.[4]

Petitioner also argues (Pet. 18-19) that the district court's instructions regarding Section 2C:27-6 were inconsistent with this Court's interpretation of the federal illegal gratuity statute at issue in *United States* v. *Sun-Diamond Growers*, 119 S. Ct. 1402 (1999). In *Sun-Diamond*, this Court found that 18 U.S.C. 201(c)

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[4] Petitioner suggests (Pet. 17) that a citation to *Savoie* in the commentary to Section 2C:27-6 supports his interpretation of the statute, but the commentary in fact suggests that Section 2C:27-6 should not be interpreted to require an explicit quid pro quo. *Cannel*, New Jersey Criminal Code Annotated, comment 4 on N.J. Stat. Ann. § 2C:27-6 (West 1995) (noting that it better serves the purpose of the section "to read 'under color of office' as meaning related to the office sufficiently to influence public duties").

(1)(A) requires the government to prove a link between the thing of value conferred on the public official and a specific "official act" for or because of which that thing was given. 119 S. Ct. at 1411. But the statutory interpretation question resolved in *Sun-Diamond* turned on the specific language of Section 201(c)(1)(A), which proscribed giving anything of value to a public official "for or because of any official act performed or to be performed by such public official." The New Jersey statute at issue here contains different language, and nothing in *Sun Diamond* suggests that federal law somehow imposes additional proof requirements with respect to such state laws. See *United States* v. *Frega*, 179 F.3d 793, 805 & n.11 (9th Cir. 1999) (observing that California law differs from the statute discussed in *Sun-Diamond* because California bribery law does not require a link between the gift and a specific official act).

3. Petitioner contends (Pet. 19-26) that the district court failed to instruct the jury that proof of a quid pro quo was required to convict petitioner under the Hobbs Act.

a. The Hobbs Act bars extortion "induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. 1951(b)(2). In *McCormick* v. *United States*, 500 U.S. 257 (1991), this Court held that, where a campaign contribution is alleged to have been obtained "under color of official right," the government must show a quid pro quo. Petitioner claims that such proof also should be required in cases not involving campaign contributions. Whether or not petitioner is correct,[5] that question is not

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[5] In *Evans* v. *United States*, 504 U.S. 255 (1992), another campaign contributions case, the Court held that an affirmative act of inducement by a public official, such as a demand, is not an element

presented by this case because the district court in fact required the jury to find a quid pro quo here. The court instructed the jury that it could convict only if it found that petitioner had "agree[d] explicitly or implicitly to take or withhold some action for the purpose of obtaining money from someone else,"; the court also referred to the public official's "promise to the payor to do or not to do an official act," and instructed the jury that the crime was completed only "when the public official knowingly accepts the benefit *in return for his agreement to perform* or not to perform an act related to his office." C.A. App. 6269-6270 (emphasis added). The instruction concluded by underscoring the government's obligation to prove that "the public official understands that he is expected, as a result of the payment, to exercise particular kinds of influence or to do certain things connected with his office as specific opportunities arise." *Id.* at 6270.

b. The court of appeals correctly rejected petitioner's further argument, Pet. 22-23, that the government was required to prove an "express agreement" between petitioner and Bradley relative to the quid pro quo. Pet. App. 14a-16a. As this Court made clear in

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of the offense of extortion under color of official right. Rather, the government "need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." *Id.* at 268. Since *Evans*, several courts of appeals have held that proof of a quid pro quo is required in all prosecutions for extortion under color of official right, even those which, like this case, do not involve campaign contributions. See, *e.g.*, *United States* v. *Collins*, 78 F.3d 1021, 1034 (6th Cir.), cert. denied, 519 U.S. 872 (1996); *United States* v. *Hairston*, 46 F.3d 361, 365 (4th Cir.), cert. denied, 516 U.S. 840 (1995); *United States* v. *Martinez*, 14 F.3d 543, 553 (11th Cir. 1994); *United States* v. *Garcia*, 992 F.2d 409, 414 (2d Cir. 1993).

Evans, the government need only show that petitioner received the payment "knowing that [it] was made in return for official acts." *Evans*, 504 U.S. at 268. See also *id.* at 274 (Kennedy, J., concurring) ("[A] quid pro quo with the attendant corrupt motive can be inferred from an ongoing course of conduct," and "[t]he official and the payor need not state the *quid pro quo* in express terms, for otherwise the law's effect could be frustrated by knowing winks and nods."); *United States* v. *Tucker*, 133 F.3d 1208, 1215 (9th Cir. 1998) (to support a Hobbs Act conviction the government must show that the official received the payment knowing it was in return for official acts; it need not show an explicit agreement).

The cases cited by petitioner are not to the contrary. In *United States* v. *Hairston*, 46 F.3d 361, cert. denied, 516 U.S. 840 (1995) (cited Pet. 20, 21), the Fourth Circuit expressly held that the quid pro quo need not be stated in express terms, or be manifested in an express agreement. In *United States* v. *Martinez*, 14 F.3d 543 (11th Cir. 1994) (cited Pet. 20), the court of appeals reversed the conviction not because an express agreement had not been proved, but rather because the district court "failed to instruct the jury on the *quid pro quo* requirement" at all, a fact the government conceded. 14 F.3d at 553.[6] Similarly, in *United States* v. *Davis*, 30 F.3d 108 (11th Cir. 1994), the district court defined a quid pro quo in its instructions, but did not

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[6] The jury was instructed in *Martinez* that "passive acceptance of a benefit by a public official is sufficient to form the basis of an extortion violation, if the official knows he had been offered the payment in exchange for the exercise of his official power, *or that such payment is motivated by hope of influence.*" 14 F.3d at 552 (emphasis added).

require the jury to find a quid pro quo in order to convict. Rather, the court "informed the jury that 'a specific quid pro quo is not always necessary for a public official to be guilty of extortion.'" *Id.* at 109. Although the Eleventh Circuit in *Davis* also indicated that "an explicit promise by a public official to act or not act is an essential element of Hobbs Act extortion," *ibid.*, that reasoning was not essential to the decision, and this Court in any event made clear in *Evans* that such an "explicit promise or undertaking" may be proved by evidence that a public official received a payment "knowing that [it] was made in return for official acts," 504 U.S. at 268.

4. Petitioner claims (Pet. 23-26) the district court erred in declining to instruct the jury that, to convict him of mail and wire fraud, "[t]he government must show that some actual harm or injury was contemplated" by petitioner. C.A. App. 6668 (requested instruction). The mail fraud and wire fraud counts against petitioner, however, alleged that, as a public official, he defrauded the State of New Jersey, the City of Newark, and their citizens, of their intangible right to his honest services.[7] The instruction requested by

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[7] The mail and wire fraud statutes, 18 U.S.C. 1341, 1343, proscribe mailings and wire transmissions in furtherance of "any scheme or artifice to defraud." In *McNally* v. *United States*, 483 U.S. 350 (1987), this Court held that Section 1341 was "limited in scope to the protection of property rights" and did not criminalize schemes "designed to deprive individuals, the people, or the government of intangible rights." *Id.* at 358, 360. The following year, Congress enacted 18 U.S.C. 1346, which provides that, for purposes of the mail fraud and wire fraud statutes, "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603(a), 102 Stat. 4508.

petitioner is not required in such a case. See 18 U.S.C. 1346 (for purposes of mail fraud and wire fraud statutes, "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services"). To the contrary, the district court's instructions—which informed the jury that the government needed to prove beyond a reasonable doubt that (1) there was a scheme or artifice to defraud another of the right to honest services, (2) that petitioner knowingly and willfully participated in the scheme to defraud, with the specific intent to defraud another of the right to honest services, and (3) that the mail or interstate wires were used in furtherance of the scheme, C.A. App. 6283—correctly described the law. See *Pereira* v. *United States*, 347 U.S. 1, 8 (1954). Accordingly, the court of appeals properly concluded that petitioner's claim was "clearly without merit." Pet. App. 16a-17a.

Petitioner points out (Pet. 23-24) that in *United States* v. *Jain*, 93 F.3d 436 (1996), cert. denied, 520 U.S. 1273 (1997), the Eighth Circuit required proof of "actual harm or injury contemplated by the schemer." *Id.* at 441. But *Jain* did not involve a public official. Instead, it involved a doctor alleged to have defrauded his patients of his "honest services" by receiving kickbacks. The *Jain* court distinguished private sector cases under Section 1346 from prosecutions of public officials. *Id.* at 441-442. The other decisions cited by petitioner involving alleged fraud in the private sector (Pet. 25) are similarly inapposite. See *United States* v. *D'Amato*, 39 F.3d 1249 (2d Cir. 1994) (lobbyist who allegedly defrauded corporation); *United States* v. *Dowling*, 739 F.2d 1445 (9th Cir. 1984), (alleged scheme by record manufacturer to defraud copyright owners of royalty fees), reversed in part on other grounds, 473

U.S. 207 (1985); *United States* v. *Von Barta*, 635 F.2d 999 (2d Cir. 1980), cert. denied, 450 U.S. 998 (1981) (trader of bonds who allegedly breached fiduciary duty to employer); *United States* v. *Dixon*, 536 F.2d 1388 (2d Cir. 1976) (corporate officer who allegedly defrauded stockholders by failing to follow proxy reporting rules).

Petitioner also cites the First Circuit's decision in *United States* v. *Sawyer*, 85 F.3d 713 (1996), a case involving a lobbyist who provided a legislator with "free meals, entertainment, and golf." *Id.* at 730. The *Sawyer* court reversed the fraud convictions because it concluded that the instructions allowed the jury to find that the defendant's violation of a state gift limitation statute, without more, established an intent to defraud under the federal mail fraud statute. *Id.* at 729 ("Allowing the jury to find that Sawyer intended to defraud the public of its right to honest services based upon proof of gift statute violations alone constituted reversible error."). While the *Sawyer* decision further suggested that, in the circumstances of that case, proof of an intent to harm was required, it did not say that the required intent must be to cause tangible loss, but rather that it must be an intent "to deprive of honest services." *Id.* at 729 n.12; see also *id.* at 724 ("undisclosed, biased decision making for personal gain, whether or not tangible loss to the public is shown, constitutes a deprivation of honest services").[8]

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[8] Moreover, the *Sawyer* decision involved the limited context of a lobbyist's gifts of entertainment to legislators, and the court noted the "longstanding and pervasive" practice of "using hospitality, including lavish hospitality, to cultivate business or political relationships." 85 F.3d at 741; see *United States* v. *Woodward*, 149 F.3d 46, 55 (1st Cir. 1998) (noting limited context of *Sawyer*), cert. denied, 119 S. Ct. 1026 (1999); John C. Coffee, Jr., *Modern Mail Fraud: The Restoration of the Public/Private Distinction*, 35 Am.

Finally, petitioner errs in asserting (Pet. 24-25) that the result reached below conflicts with *United States* v. *Rabbitt*, 583 F.2d 1014 (8th Cir. 1978), cert denied, 489 U.S. 1116 (1979). In *Rabbitt*, the court found no deprivation of honest services where a state representative introduced a friend's firm to the public officials responsible for awarding architectural contracts. *Id.* at 1025-1026. In *Rabbitt*, however, the defendant played no role in the awards, which were granted on merit. *Id.* at 1026. Moreover, the defendant in *Rabbitt* "was under no affirmative duty to disclose his interest." *Ibid.* (noting that the government had cited no standard of conduct applicable to legislators that clearly required disclosure). Here, petitioner misused his authority to assist Bradley and his clients in obtaining contracts—by keeping other potential competitors out of the bidding and by passing along information—and petitioner "did not reveal his receipt of [the Bradley] payments on financial forms he was required to file by reason of his public positions." Pet. App. 4a.

5. Petitioner's final claim is that the district court should have, under Federal Rule of Evidence 403, excluded evidence that the FBI found $157,000 in cash when it searched the residence of petitioner's girlfriend, Janice Williams, in November 1995. He argues that the evidence of the cash was inflammatory and that its probative value was substantially outweighed

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Crim. L. Rev. 427, 460 (1998) (observing that "decisions such as *Sawyer* are best viewed as cases in which the gratuities received (i.e., meals and drinks and golf rounds) were too inconsequential to amount to a fiduciary breach"). In addition, the First Circuit has made it clear that a public official can "steal his honest services" from his public employer by "fail[ing] to disclose a conflict of interest, resulting in a personal gain." *Woodward*, 149 F.3d at 56 (citing *Sawyer*, 85 F.3d at 724).

by the danger of unfair prejudice. Pet. 26-30. That claim involves only the application of established legal principles to the specific facts of this case, and was correctly resolved by the court of appeals in any event.

As the court of appeals observed, the government "had a legitimate reason to offer the evidence to attack Williams' credibility." Pet. App. 10a. Williams claimed that she had found that cash in her father's house in October 1995, and had taken it to her residence. *Id.* at 8a-10a. The evidence that her father had that much cash, however, undercut Williams' assertion that she had loaned her father the proceeds of Bradley's first $3600 check to her. *Id.* at 9a. Moreover, evidence that Williams had that much money impeached her testimony that Bradley's three payments to her were loans, as Williams did not repay Bradley for the supposed loans when she found the $157,000. *Ibid.*

While that evidence thus was highly relevant to Williams' credibility, it was also presented in a manner that minimized the possibility of undue prejudice. The government made no effort at trial to link the cash to petitioner. Pet. App. 9a. And the district court gave explicit limiting instructions to the jury regarding the permissible uses of that evidence. *Id.* at 10a. Petitioner offers no reason to depart from "the almost invariable assumption of the law that jurors follow their instructions." *Shannon* v. *United States*, 512 U.S. 573, 585 (1994). See also *Marshall* v. *Lonberger*, 459 U.S. 422, 438 n.6 (1983) (limiting instruction regarding purposes for which evidence of prior convictions may be used); *Spencer* v. *Texas*, 385 U.S. 554, 561 (1967) (same). Under those circumstances, the court of appeals correctly found no reason to overturn as an abuse of discretion the district court's decision to admit the evidence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

JAMES K. ROBINSON
Assistant Attorney General

WILLIAM C. BROWN
Attorney

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